Supreme Court, U.S.
FILED
061322 MAR 30 2007
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No. _____

In the
Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

PAUL HOLOWECKI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

R. JEFFERY KELSEY*
EDWARD EFKEMAN
FEDERAL EXPRESS CORPORATION
LEGAL DEPARTMENT, LITIGATION
3620 HACKS CROSS ROAD
THIRD FLOOR, BUILDING B
MEMPHIS, TN 38125-8800
(901) 434-8563
(901) 434-8555
* Counsel of Record

ROBERT K. SPOTSWOOD
KENNETH D. SANSOM
EMILY J. TIDMORE
SPOTSWOOD SANSOM
& SANSBURY LLC
940 CONCORD CENTER
2100 THIRD AVENUE NORTH
BIRMINGHAM, AL 35203
(205) 986-3620

Counsel for Petitioner Federal Express Corporation

March 30, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the Second Circuit erred in concluding, contrary to the law of several other circuits and implicating an issue this Court has examined but not yet decided, that an "intake questionnaire" submitted to the Equal Employment Opportunity Commission ("EEOC") may suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The Petitioner here and appellee below is Federal Express Corporation (d/b/a FedEx Express).

The Respondents here and appellants below are Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Thompics. By virtue of the allegations of their Complaint in the District Court, the Respondents seek to represent a putative class of persons similarly situated, but no motion for class certification has yet been filed and no class has been certified.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

The parent company of Petitioner Federal Express Corporation (d/b/a/ FedEx Express) is FedEx Corporation, whose stock is publicly traded on the New York Stock Exchange under the symbol FDX.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 440 F.3d 558, and is reprinted in the Appendix to the Petition ("Pet. App.") at 3a–23a. The District Court's opinion is not reported, but is available at 2002 WL 31260266, and 2002 U.S. Dist. LEXIS 19100, and is reprinted at Pet. App. 31a–42a.

JURISDICTION

The Court of Appeals for the Second Circuit issued its opinion on March 8, 2006. The Court of Appeals entered its order denying rehearing and rehearing en banc on October 31, 2006. On January 23, 2007, Justice Ginsburg extended the time for filing a petition for a writ of certiorari until March 30, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* The pertinent provisions are reproduced at Pet. App. 62a–67a.

STATEMENT OF THE CASE

District court jurisdiction. The court of first instance, the United States District Court for the Southern District of New York, had jurisdiction of this matter pursuant to 28 U.S.C. § 1331.

Factual Background. In December 2001, Respondent Patricia Kennedy submitted to the EEOC an intake questionnaire, EEOC Form 283, in which she provided

information about allegations of age discrimination by her employer, Federal Express Corporation ("FedEx"). Pet. App. 43a–52a. The intake questionnaire did not include any indication that it constituted a charge of discrimination for purposes of the ADEA. Indeed, Form 283 states that it is a means for determining whether the EEOC has jurisdiction over "potential charges" and for providing "pre-charge filing counseling." *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1241 (11th Cir. 2004), *cert. denied*, 543 U.S. 1020, 125 S. Ct. 656 (2004). Nor did the EEOC treat Kennedy's intake questionnaire as a charge: the EEOC did not assign the intake questionnaire a charge number, did not notify FedEx of the intake questionnaire, and did not commence an investigation based on the intake questionnaire—acts the EEOC is required to do if it receives a charge. *See* 29 U.S.C. § 626(d) ("Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.").

Then, in April 2002, Respondent Kennedy and thirteen other current and former FedEx employees initiated this lawsuit in the Southern District of New York, alleging that FedEx had implemented policies in 1994 and 1995 that violated the ADEA. R.1.[1] The Complaint did not allege that Kennedy or any of the thirteen other plaintiffs had filed a charge of discrimination; nor did it allege that the December 2001 intake questionnaire completed by Kennedy constituted a charge. *See* R.1.

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[1] Citations to record evidence refer to the docket number in the district court record.

Respondent Kennedy finally filed a formal charge of discrimination with the EEOC on May 30, 2002—one month after she had filed this lawsuit—using the EEOC's form for charges, Form 5. R.8, Ex. 7.[2] This charge was untimely because Kennedy had filed suit *before* filing the charge, despite the ADEA's requirement that an employee wait to file suit until sixty days *after* filing an EEOC charge to permit the EEOC time to investigate and to seek conciliation between the employee and employer. *See* 29 U.S.C. § 626(d) ("No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC].").

Lower Court Proceedings. FedEx moved to dismiss the complaint on the ground that none of the fourteen named plaintiffs had filed a timely or valid charge of discrimination with the EEOC, as required by the ADEA. R.4; 29 U.S.C. § 626(d). Because the charge filed by Respondent Kennedy in May 2002 was clearly untimely, the plaintiffs did not assert that charge as the basis for their suit. Instead, they argued, among other things, that the ADEA's charge requirement was satisfied by Respondent Kennedy's pre-charge intake questionnaire—even though the EEOC had not treated the intake questionnaire as a charge, the intake questionnaire was not served on FedEx as the ADEA requires for a charge, 29 U.S.C. § 626(d), and Kennedy filed a separate, formal charge against FedEx after suit was filed. R.8. Moreover, those

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[2] The filing of this charge triggered the EEOC's investigative machinery: it assigned the charge a number, gave FedEx notice of it on July 9, 2002, and sought information from FedEx for its investigation of the allegations. The EEOC closed its investigation of Kennedy's charge on November 13, 2002, because "Charging Party has filed a lawsuit . . . on the same basis and issues in a court of competent jurisdiction."

plaintiffs who had not filed anything with the EEOC argued that they should be allowed to "piggyback" on Kennedy's intake questionnaire in fulfillment of their own charge-filing requirements. The plaintiffs presented no evidence that Respondent Kennedy had believed, either reasonably or unreasonably, that the intake questionnaire she submitted constituted a charge. They submitted no proof that the EEOC had advised Kennedy that the intake questionnaire sufficed as a charge or otherwise misled her with regard to the effect of the intake form. In fact, the plaintiffs failed to submit any proof that Kennedy ever discussed the intake questionnaire with any EEOC representative. *See* R.8.

The District Court granted the motion to dismiss on the ground that no plaintiff had filed a timely charge of discrimination in fulfillment of the ADEA's charge-filing requirement. *Holowecki v. Federal Express Corp.*, 2002 WL 31260266, at *1, 6 (S.D.N.Y. 2002). The District Court rejected the plaintiffs' argument that Kennedy's submission of the intake questionnaire in December 2001 satisfied the charge requirement and, as a result, also rejected their argument that the other plaintiffs could "piggyback" on Kennedy's intake form in fulfillment of their own charge requirements. *Id.* at *4.

The Second Circuit reversed on appeal, however. It concluded that Respondent Kennedy could sue FedEx without having filed a timely charge of discrimination, without having had the EEOC investigate her allegations or seek to resolve them and, indeed, without having provided FedEx with notice of any sort before proceeding with suit. *Holowecki v. Federal Express Corp.*, 440 F.3d 558 (2d Cir. 2006). The Second Circuit then compounded this abrogation of pre-suit requirements under the ADEA by permitting eleven of the other named plaintiffs to "piggyback" on Kennedy's suit

without themselves having met any of the pre-suit requirements of the statute. *Id.* at 569. The sole basis for this abrogation of the statute's requirements was Kennedy's decision to complete the EEOC intake questionnaire, which had not been treated as a charge by Kennedy or the EEOC and which gave FedEx no notice of Kennedy's personal claims, much less those of the eleven other "piggybacking" plaintiffs. *Id.* at 568–69.

The Second Circuit viewed this misuse of an intake form as permissible because the form contained the minimal information found in an EEOC charge. *Id.* at 568. In so holding, the Second Circuit ignored the practical use of—and the express statutory purpose for—that required information: to give notice to the allegedly discriminating employer so that the claims might be resolved without a suit and to initiate the EEOC's apparatus for deciding whether to pursue suit itself or permit a private plaintiff to proceed on her own. *Id.* at 568–69; *cf.* 29 U.S.C. § 626(d).

FedEx timely petitioned for rehearing or rehearing *en banc*, but the Second Circuit denied that request on October 31, 2006. *See* Pet. App. at 1a–2a.

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question of federal law that has not been, but should be, settled by this Court, *see* S. Ct. R. 10(b), and on which the Circuit Courts of Appeal are in conflict, *see* S. Ct. R. 10(a): When may a document that fails to fulfill the statutory functions of the pre-suit "charge" of discrimination required by the ADEA nevertheless constitute a charge? The answer to that question is of paramount importance to the continued vitality of Congress's vision that employers and employees engage in

voluntary, conciliatory efforts to resolve discrimination claims, and that employees exhaust administrative remedies, before a suit is filed.

This Court should grant certiorari review to resolve this dispute between the circuits and to draw the appropriate line between, on the one hand, respecting the system of adjudication created by Congress under which charges are the mechanism triggering notice to the employer and conciliation efforts by the EEOC, and, on the other hand, avoiding the potentially harsh effects of holding that no charge has been filed by employees who have been led to believe they have filed a charge. Allowing the decision of the Second Circuit to stand without articulating clear guidance on this issue will only foster continued division among the circuits and further slippage from the statutory framework envisioned by Congress.

I. THIS CASE RAISES THE IMPORTANT QUESTION OF WHEN A DOCUMENT THAT FAILS TO FULFILL THE FUNCTIONS OF A CHARGE MAY NEVERTHELESS CONSTITUTE A CHARGE.

The question presented in this case—whether and under what circumstances a document containing the minimum information required for a charge under the ADEA but failing to fulfill the congressionally intended functions of a charge may nevertheless suffice as a charge—is critically important because it determines two major issues: (1) who is permitted to bring a lawsuit alleging discrimination in violation of the ADEA; and (2) whether Congress's framework requiring charge-filing will be respected so that the EEOC can reduce age discrimination and, consequently, litigation over age discrimination.

Congress has determined that the EEOC is often in the best position to prevent, and resolve claims of, age discrimination. As a result of that determination, Congress requires an employee to file a timely charge of discrimination with the EEOC before she may bring a lawsuit alleging age discrimination. 29 U.S.C. § 626(d). This charge-filing requirement is designed to give the EEOC an opportunity, before suit is filed, to provide an employer with notice of the allegations of discrimination, to investigate such allegations, to seek conciliation between the employer and employee, and to decide whether it should pursue suit against the employer or allow the employee to file suit herself. *See, e.g.*, *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.2d 1208, 1220 (11th Cir. 2001); *Dezaio v. Port Auth. of N.Y. & N.J.*, 205 F.3d 62, 64–65 (2d Cir. 2000); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 542 (7th Cir. 1988); *Bihler v. The Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983). Thus, the filing of a charge triggers the EEOC's obligation to fulfill two important statutory duties: (1) "promptly notify[ing] all persons named in such charge as prospective defendants in the action"; and (2) "seek[ing] to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." 29 U.S.C. § 626(d). An employee who fails to bring a charge within the requisite time period, or to provide the EEOC with adequate time to perform its notice and conciliation duties after the filing of a charge, is barred from suing for age discrimination in court.[3] *See* 29 U.S.C. § 626(d) ("No civil action may be commenced" unless the

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[3] To be timely, the charge must be filed within 180 days after the occurrence of the alleged unlawful practice, except in states with their own age discrimination laws and remedial agencies, where the time is extended to 300 days. 29 U.S.C. §§ 626(d), 633(b). In addition, an employee must wait for sixty days after filing her charge before bringing suit in court. 29 U.S.C. § 626(d).

time requirements are met); *see also, e.g.*, *O'Neill v. N.Y. Times Co.*, 145 Fed. Appx. 691, 694 (1st Cir. 2005) (affirming dismissal of claim as time-barred where charge was filed more than 300 days after employee was put on notice of age discrimination); *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1241 (11th Cir. 2004) (affirming dismissal of ADEA claims where employee filed suit before expiration of sixty-day post-charge waiting period). Obviously, then, the question of what constitutes a charge is crucial.

Yet the ADEA does not define what constitutes a charge. To ensure that it has information sufficient to fulfill its congressional mandates of notification and conciliation, the EEOC has established interpreting regulations specifying the minimum components of a charge under the ADEA. A charge must be filed with the EEOC and must be in writing. 29 C.F.R. §§ 1626.3, 1626.6, 1626.8. A charge must name the employer and generally describe the allegedly discriminatory acts. 29 C.F.R. § 1626.6. In addition, a charge should contain the full contact information for the employer and the person filing the charge, a "statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices," the approximate number of employees of the prospective defendant employer, and information about any state proceedings involving the alleged unlawful employment practice at issue. 29 C.F.R. § 1626.8. The EEOC has also established a formal charge form, EEOC Form 5, which, when completed, satisfies these regulations and unquestionably constitutes a charge under the ADEA.

Many times, however, an employee submits a document to the EEOC that may contain the minimum required information for a charge, but is not on the EEOC's formal charge form. For instance, an employee may send a letter to the EEOC naming the employer and generally describing

alleged discriminatory acts. *See, e.g.*, *Bihler v. The Singer Co.*, 710 F.2d 96, 97–98 (3d Cir. 1983); *Thomure v. Phillips Furniture Co.*, 30 F.3d 1020, 1025–26 (8th Cir. 1994). More commonly—as in this case—an employee completes an intake questionnaire form, EEOC Form 283, which the EEOC uses to collect information about allegedly discriminatory practices. Such a form, when completed, will almost always contain the minimum required information for a charge.

At times, the EEOC treats such informal documents as charges, providing notice of them to prospective defendant employers and starting investigation and conciliation efforts. *See, e.g.*, *Philbin v. Gen. Elec. Capital Auto Lease, Inc.*, 929 F.2d 321, 322 (7th Cir. 1991) (EEOC assigned a charge number to employee's intake questionnaire and sent a Notice of Charge of Discrimination to employer); *Price v. Sw. Bell Tel. Co.*, 687 F.2d 74, 76 (5th Cir. 1982) (EEOC sent a Notice of Charge of Discrimination to employer based on employee's completion of intake questionnaire); *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1321 (11th Cir. 2001) ("after some prodding" by employee, EEOC treated her intake questionnaire as a charge and "issued belated notice of the charge" to her employer); *Sylvester v. Am. Online, Inc.*, 2006 WL 1793289, at *4 (D. Utah 2006) ("EEOC acted on the Intake Questionnaire to serve notice on AOL.").

Generally, however—and as in this case—the EEOC does not treat such informal documents as charges, neither providing notice of them to prospective defendant employers nor beginning investigation and conciliation efforts. *See, e.g.*, *Holowecki*, 740 F.3d at 561 (EEOC did not give employer notice of intake questionnaire and did not institute investigation or conciliation efforts); *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1240 (11th Cir. 2004) (same); *Casavantes v. Cal. State Univ.*, 732 F.2d 1441, 1443 n.2 (9th

Cir. 1984) (same); *Diez v. Minn. Mining & Manuf. Co.*, 88 F.3d 672, 674 (8th Cir. 1996) (same); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 543 (7th Cir. 1988) (same); *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132, 1137-38 (7th Cir. 1993) (same).

This latter practice gives rise to the important question of whether and when an intake questionnaire or other pre-charge document that has not been treated as a charge by the EEOC can nevertheless constitute a charge for purposes of the ADEA. In other words, in what circumstances may an intake questionnaire or pre-charge document constitute a charge even when it fails to fulfill the congressional purposes for a charge; namely, even if it fails to trigger notice to the employer or investigatory and conciliatory efforts by the EEOC?

This question has important ramifications. Allowing intake questionnaires or other pre-charge documents failing to fulfill the functions of charges to constitute charges will lead to increased litigation because doing so passes the important process of pre-litigation conciliation. If the EEOC has not treated a document as a charge, efforts at conciliation will not occur and fewer claims will be resolved prior to litigation. Increased litigation is detrimental for all parties involved. It is bad for employees, who will be forced to wait longer for a resolution and incur the legal expenses of litigating their claims. It is bad for employers, who will be forced to defend themselves against allegations of which they received no notice. In addition, employers are significantly penalized if deprived of the opportunity to resolve claims without litigation because they may be liable for the employee's attorney's fees once suit is filed. *See Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 1001 (10th Cir. 2005) ("Attorney fees may be awarded to the prevailing party in age-discrimination cases through the ADEA's incorporation of

remedies available under the Fair Labor Standards Act. *See* 29 U.S.C. § 626(b).").

And, increased litigation burdens courts, which will have to devote more resources to resolving disputes under the ADEA. *See U.S. v. Dieter*, 429 U.S. 6, 97 S. Ct. 18 (1976) (noting that the Court must be "wary of imposing added and unnecessary burdens on the courts of appeals"); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 212, 114 S. Ct. 1461 (1994) (rejecting a proposed outcome because it would "burden the courts with additional litigation"); *cf. Davis v. U.S. Steel Supply*, 688 F.2d 166, 193 (3d Cir. 1982) (Sloviter, J., dissenting) ("The advantages . . . of a procedure whereby disputes may be resolved by conference, conciliation and persuasion are evident: an unrepresented claimant may seek and sometimes be awarded relief; the parties may informally resolve their differences without the bitterness engendered by litigation; and the courts are spared the additional burden of yet more lawsuits.").

Allowing intake questionnaires failing to fulfill the functions of charges to constitute charges also frustrates Congress's intention that suits alleging age discrimination be timely brought to prevent stale claims. Under the ADEA, a plaintiff is required to bring suit within ninety days of receiving notice that the EEOC proceedings have been terminated. *See* 29 U.S.C. § 626(e).[4] If the EEOC does not

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[4] Under the ADEA—unlike under Title VII, 42 U.S.C. §§ 2000e-5(f)(1), and the Americans with Disabilities Act, 42 U.S.C. §§ 12117—receipt of a notice of right to sue is not a condition precedent to bringing suit. *See* 29 U.S.C. § 626(d); *Julian v. City of Houston*, 314 F.3d 721, 725–27 (5th Cir. 2002); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1100 (11th Cir. 1996); *Seredinski v. Clifton Precision Prod. Co.*, 776 F.2d 56, 63 (3d Cir. 1985). The ADEA

view an intake questionnaire as a charge, however, it does not institute proceedings and, as a result, will never issue notice that its proceedings have terminated. Thus, there will be no limitation on how long an employee may wait before bringing suit. In other words, once an employee has submitted an intake form within the requisite time period for charges, she can wait indefinitely to bring her suit. This means that the employee could bring suit against the employer for actions that occurred years earlier and of which the employer never received notice.

Such delayed notice of alleged discriminatory acts is problematic because it deprives employers of the opportunity to detect and correct potentially discriminatory employment practices in a timely and efficient manner, thus undercutting the ADEA's primary goal of preventing unlawful discrimination. *See Zinger v. Blanchette*, 549 F.2d 901, 905 (3d Cir. 1977) ("The primary purpose of the [ADEA] is to prevent age discrimination in hiring and discharging workers."). Moreover, it requires employers to defend themselves against claims based on incidents that occurred years earlier. These employers, having received no notice of the employee's allegations against them, may have destroyed the pertinent employment records under a reasonable record-retention policy, only to be informed later of the employee's stale claims against which they must defend.

Finally, the question of whether and in what circumstances intake questionnaires may constitute charges dramatically affects the EEOC's workload. If intake questionnaires constitute charges, they trigger the EEOC's

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requires only that suit be brought within ninety days if a notice of right to sue is received. 29 U.S.C. § 626(e).

statutory obligations with regard to charges. Thus, the EEOC will be required to provide notice to employers and to effectuate conciliation efforts based on intake questionnaires, rather than formal charges. Since 1997, the EEOC has processed between 75,000 and 80,000 charges per year, which is an unknown fraction of the probably much higher number of completed intake questionnaires that it receives. *See* U.S. Equal Employment Opportunity Commission, Charge Statistics FY 1997 through FY 2006, http://www.eeoc.gov/stats/charges.html (last visited March 29, 2007).[5] Furthermore, the unanswered question of what constitutes a charge for ADEA purposes extends beyond intake questionnaires. If the formal charge process is abandoned, the EEOC will be required to treat every document that includes the minimal information required for a charge as a formal charge triggering the investigatory machinery of the agency. Some circuits have recognized the danger in this course. *See, e.g., Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992) (warning against treating intake questionnaires "willy nilly" as charges); *Bost*, 372 F.3d at 124 (same); *Steffen*, 859 F.2d at 542 (rejecting argument that would treat every questionnaire and most phone messages as charges). Therefore, concluding that intake questionnaires—and other pre-charge documents—constitute charges will lead to a significant increase in the EEOC's workload.

As demonstrated, whether and in what circumstances intake questionnaires and other pre-charge documents can constitute charges has important ramifications for employers, employees, the EEOC, and courts, as well as for the vitality

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[5] The EEOC does not report on its website the number of completed intake questionnaires it receives annually.

of Congress's vision for the ADEA. Moreover, this question is not only significant, but it has divided the circuits, as discussed next.

II. THE CIRCUITS ARE DIVIDED ON THIS IMPORTANT ISSUE.

Six federal circuits have addressed the question of whether and in what circumstances an intake questionnaire may constitute a charge under the ADEA, and other circuits have considered the subject with regard to different discrimination statutes.[6] The circuits have reached contradictory conclusions. *See Pijnenburg v. W. Ga. Health Sys., Inc.*, 255 F.3d 1304 (11th Cir. 2001) ("On appeal, plaintiff asks us to treat an 'intake questionnaire' as a charge. . . . [T]he circuits are divided on this point."); *see also Smith v. Video Servs. of Am., L.P.*, 2000 WL 1521606, at *3 (E.D. Pa. 2000) ("[T]he circuits are split regarding whether EEOC Intake Questionnaires can fulfill the charge-filing requirement . . . ."). Therefore, review by this Court is both necessary and appropriate. *See* S. Ct. R. 10(a) (a compelling reason for granting certiorari is when "a United States court

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[6] The charge-filing requirements for the ADEA and other discrimination statutes are similar, but not identical. For instance, a charge under the ADEA need not be verified, while a charge under Title VII and the ADA must be. *See Diez v. Minn. Mining & Manuf. Co.*, 88 F.3d 672, 675 (8th Cir. 1996) ("Unlike Title VII, the ADEA does not require that a charge be verified."); *Zillyette v. Capital One Finan. Corp.*, 179 F.3d 1337, 1339 (11th Cir. 1999) (ADA plaintiffs must comply with same procedural requirements for suit as plaintiffs in Title VII cases). Therefore, while a decision in one context about whether an intake questionnaire constitutes a charge may be instructive, it does not necessarily determine the issue with regard to other contexts.

of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter").

A. Circuits suggesting that intake questionnaires are not charges at all.

Two circuits have suggested that an intake questionnaire simply does not constitute a charge for purposes of the ADEA. In *Dorn v. General Motors*, the Sixth Circuit rejected the plaintiffs' contention that their submission of an EEOC questionnaire constituted a charge. 131 Fed. Appx. 462, 470 n.7 (6th Cir. 2005). According to the *Dorn* court, "the questionnaire was not a formal charge of discrimination within the meaning of the ADEA" and "the statutory language requiring a formal charge, not an inquiry or complaint, is clear." *Id.*

Likewise, in *Bailey v. United Airlines*, the Third Circuit addressed an employee's claim that he had exhausted his administrative remedies pursuant to the ADEA because he had submitted an EEOC intake questionnaire within the applicable limitations period. 279 F.3d 194, 199 n.2 (3d Cir. 2002). Although the *Bailey* court concluded that the employee had waived the argument by failing to adequately raise it before the district court, it went on to state that, "even were the argument not waived, the intake questionnaire was not adequate to constitute a charge sufficient to toll the limitations period." *Id.*

B. Circuits concluding that intake questionnaires may be charges in limited circumstances.

Three other circuits—the Seventh, Eighth, and Eleventh—have specifically recognized that "an intake

questionnaire is not intended to function as a charge." *Bost v. Federal Express Corp.*, 372 F.3d 1233, 1241 (11th Cir.); *accord Steffen*, 859 F.2d at 542 (7th Cir.); *Diez*, 88 F.3d at 676 (8th Cir.). These circuits have also recognized that where an intake questionnaire fails to fulfill the twin purposes of a charge—notice and conciliation—treating the document as a charge undermines Congress's purpose for the ADEA. *See Diez*, 88 F.3d at 676–77 (8th Cir.) ("If the EEOC . . . understands the claimant's lodging of the questionnaire to be preliminary, it does not notify the employer of the charge. This frustrates a major goal of the ADEA, which is to encourage pre-litigation resolution of claims."); *Steffen*, 859 F.2d at 542–43 (7th Cir.); *Bost*, 372 F.3d at 1240 (11th Cir.). These circuits have therefore concluded that an intake questionnaire can substitute for a charge under the ADEA only in limited circumstances.

First, the Seventh and Eleventh Circuits have determined that an intake questionnaire can equal a formal charge under the ADEA when it contains all the information that a charge would contain and the EEOC treats it as a charge. *See Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992); *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1241 (11th Cir. 1989). This approach, which the Seventh Circuit calls "substantial compliance," recognizes that when "the EEOC itself treats the Intake Questionnaire as the formal charge"—providing notice to the employer and instigating conciliatory efforts—"it is hard to see what more to ask of the employee." *Early*, 959 F.2d at 80–81. Similarly, the Fifth Circuit has concluded that, for purposes of Title VII, an intake questionnaire can be a charge where the EEOC has treated it as one. *See Price v. Sw. Bell Tel. Co.*, 687 F.2d 74, 78–79 (5th Cir. 1982) (concluding that an employee's completed intake questionnaire constituted a charge for purposes of Title VII because the EEOC had treated it as a

charge by providing notice of it to the prospective defendant employer).

Second, the Seventh and Eleventh Circuits will allow an intake questionnaire to constitute a charge—even if the EEOC has not treated it as a charge—if there is evidence showing that the employee reasonably believed the form sufficed for a charge. *See Steffen*, 859 F.2d at 544 (7th Cir.) ("[T]he EEOC informed Steffen that it would be treating the Intake Questionnaire as a charge but then failed to treat it as a charge."); *Bost*, 372 F.3d at 1240–41 (11th Cir.) (citing *Wilkerson*, 270 F.3d at 1320–21 (11th Cir.), where the court found that the employee could reasonably believe that the EEOC would protect her interests with regard to her charge based on its communications to her, and where the form itself indicated that it could be a charge). In other words, where it is reasonable for an employee to believe that her intake form constitutes a charge—particularly where that belief is based on communications from the EEOC about the effect of the form—the Seventh and Eleventh Circuits allow that document to constitute a charge. The Eighth Circuit has suggested, although never held, that it may also allow an intake questionnaire to constitute a charge under the ADEA

in these circumstances. *See Diez v. Minn. Mining & Manuf. Co.*, 88 F.3d 672, 677 (8th Cir. 1996).[7]

Where there is no evidence of such a reasonable belief by the employee, however, the Seventh, Eighth and Eleventh Circuits do not allow an intake questionnaire that has not been treated as a charge by the EEOC to function as a charge. *See Steffen*, 859 F.2d at 542–44 (7th Cir.) (rejecting plaintiff's argument that an intake questionnaire constituted a charge even in the absence of evidence showing employee's reasonable belief it would be treated as a charge); *Perkins v. Silverstein*, 939 F.2d 463, 470 (7th Cir. 1991) (intake questionnaire did not constitute a charge where employee could not reasonably believe that it was a charge because the EEOC had told him that no further action would be taken on it); *Diez*, 88 F.3d at 677 (intake questionnaire was not a charge because there was no evidence that the state agency "led [employee] to believe he had done all that was necessary once he returned the questionnaire" and the questionnaire itself indicated that it was preliminary to a charge); *Bost*, 372 F.3d at 1240–41 (11th Cir.) ("This case lacks the exceptional circumstances relied on by the *Wilkerson* Court in concluding that the intake questionnaire in that case was a charge. . . . Bost clearly understood that the intake questionnaire was not

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[7] Similarly, although the Third Circuit later decided that an intake questionnaire did not constitute a charge for purposes of the ADEA, *see Bailey v. United Airlines, supra*, in an earlier case it was careful not to foreclose the possibility that a document other than a formal charge may constitute a charge. *Bihler v. The Singer Co.*, 710 F.2d 96, 99–100 (3d Cir. 1983). The *Bihler* court did not detail the circumstances in which that may be true, however, other than holding that it is not true, as a matter of law, when a reasonable person would not believe that the document at issue constituted a charge. *Id.*

a charge . . . there is no evidence of any misleading communication between Bost and the EEOC . . . [and] the questionnaire form itself did not suggest that it was a charge.").

Accordingly, in the Seventh, Eighth, and Eleventh Circuits, an intake questionnaire constitutes a charge only in certain, limited circumstances.

C. Circuits concluding that all intake questionnaires are charges.

The Second Circuit has reached yet a different conclusion. Unlike the Third and Sixth Circuits—which have never found an intake questionnaire to constitute a charge under the ADEA—and the Seventh, Eighth, and Eleventh Circuits—which have found intake questionnaires failing to fulfill the functions of notice and conciliation to constitute charges only where there are strong indications that the employee reasonably believed the questionnaire was sufficient—the Second Circuit's decision in this case allows any "written filing that complies with the ADEA and contains the information required by EEOC interpreting regulations" to suffice as a charge, even when that document does not fulfill the functions of a charge and there is no evidence that the employee reasonably believed it would suffice as a charge. *See Holowecki v. Federal Express Corp.*, 440 F.3d 558, 567-69 (2d Cir. 2006).[8]

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[8] In fact, the Second Circuit's abrogation of the charge-filing requirement is compounded further because it allows other plaintiffs—who never filed anything with the EEOC—to piggyback on another plaintiff's intake questionnaire to satisfy their own charge requirements. *See Holowecki*, 440 F.3d at 569.

By its decision, the Second Circuit has aligned itself with the Fourth and Ninth Circuits, which have held in the context of Title VII that documents failing to serve the functions of a charge may constitute a charge even in the absence of any evidence regarding the plaintiff's reasonable belief. In *Edelman v. Lynchburg College*, the Fourth Circuit held that a professor's letter to the EEOC, which the EEOC did not treat as a charge, constituted a charge because it included the requisite information for a charge. 300 F.3d 400 (4th Cir. 2002). The *Edelman* court did not require evidence of the employee's reasonable belief that the letter would suffice as a charge. *See id.* In fact, the Fourth Circuit concluded that the letter constituted a valid charge even though the evidence showed the opposite: just two weeks after Edelman had submitted his letter, the EEOC had informed Edelman that his letter was insufficient and that it would need more information from him. *See id.* at 403, 405.

In *Casavantes v. California State University*, the Ninth Circuit determined that an intake questionnaire, which the EEOC had not treated as a charge, nevertheless constituted a charge under Title VII because it was a "written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of," as the EEOC's regulations require charges to do. 732 F.2d 1441, 1443 (9th Cir. 1984). Like the *Edelman* court, the *Casavantes* court reached this conclusion without regard to whether the employee had reasonably believed that the questionnaire he submitted was sufficient. *See id.*

Thus, in the Second Circuit—and likely in the Fourth and Ninth Circuits as well—any intake questionnaire containing the minimum information required for a charge will constitute a charge for purposes of the ADEA, regardless of whether the

EEOC or the employee considered the questionnaire to be a charge.

D. The *Bost/Holowecki* example.

The split between the circuits on this issue is most dramatically illustrated by comparing the Second Circuit's decision below with the Eleventh Circuit's decision in *Bost v. Federal Express Corp.*, 372 F.3d 1233 (11th Cir. 2004). Although the facts of these two cases are identical, the Second and Eleventh Circuits reached opposite conclusions.

Both *Holowecki* and *Bost* were putative class actions involving allegations that FedEx violated the ADEA through unfair application of performance standards to older couriers.[9] *See Holowecki*, 440 F.3d at 561–62; *Bost*, 372 F.3d at 1236. In *Bost*, none of the named plaintiffs had filed a timely formal charge of discrimination with the EEOC. *See Bost*, 372 F.3d at 1243. And in *Holowecki*, only a few of the named plaintiffs had filed colorable charges, some of which were clearly untimely and others of which were of questionable timeliness. *See Holowecki*, 440 F.3d at 569–70. In both cases, however, a single named plaintiff had filed an intake questionnaire within the time limits required for charges. *See Bost*, 372 F.3d at 1236; *Holowecki*, 440 F.3d at 563. Therefore, the crucial issue for most of the plaintiffs in both cases was whether that intake questionnaire constituted a charge, such that they could proceed with their ADEA claims. *See Bost*, 372 F.3d at 1235; *Holowecki*, 440 F.3d at 568.

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[9] Not only was the defendant, FedEx, the same in both cases, but at least one of the named plaintiffs was also the same. Phyllis Nelson was a named plaintiff in both *Bost* and *Holowecki*. *See Bost*, 372 F.3d at 1236; *Holowecki*, 440 F.3d at 558.

Notably, the completed intake questionnaires in *Holowecki* and *Bost* were identical in every meaningful respect. In *Holowecki*, the relevant questionnaire was submitted by Respondent Kennedy and consisted of the two-page Form 283 plus a five-page, typewritten affidavit notarized by Audrey Marie Maccia.[10] Pet. App. at 43a–52a. In *Bost*, the relevant questionnaire was submitted by Anthony Bost and consisted of the two-page Form 283 plus a six-page, typewritten affidavit notarized by Audrey Marie Maccia. Pet. App. at 53a–61a. Both Kennedy and Bost asserted claims of discrimination against FedEx at its Dunedin, Florida, facility. Pet. App. at 43a–44a, 53a–54a. Specifically, the questionnaires submitted by Kennedy and Bost both alleged that FedEx discriminated against them because of their age by using a program known as "Best Practices Pays" to impose unattainable performance standards on older, but not younger, couriers. Pet. App. at 45a–51a, 55a–60a. Both questionnaires also asserted that FedEx has discriminated against its older couriers by unilaterally delaying their start times. Pet. App. at 48a–50a, 56a–60a. In fact, at least four sentences are identical—word-for-word—in the Bost and Kennedy questionnaires. *Compare* Pet. App. at 49a–50a with *id.* at 57a.

And the similarities did not end there. The actions of Kennedy, Bost, and the EEOC after the filing of the questionnaires were also identical in every relevant respect. Kennedy submitted her questionnaire to the EEOC on December 3, 2001, *see Holowecki*, 440 F.3d at 568; Bost submitted his questionnaire just two weeks later, *see Bost*,

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[10] The first page of Kennedy's Form 283 makes clear that it was a two-page document, *see* Pet. App. at 43a, but the *Holowecki* plaintiffs inexplicably produced only the first page in the proceedings below.

372 F.3d at 1236. Upon receiving the questionnaires, the EEOC did not treat either one like a charge: it did not assign them charge numbers, send FedEx notice of them, or use them to begin conciliation efforts. *See Bost*, 372 F.3d at 1240–41; *Holowecki*, 440 F.3d at 561. Then, in April 2002—approximately five months after filing her intake questionnaire and without having filed a formal charge—Kennedy, with the other *Holowecki* plaintiffs, filed suit against FedEx in the Southern District of New York. *See Holowecki*, 440 F.3d at 568. One month later, Kennedy filed a formal charge of discrimination with the EEOC. *Id.* at 563. Likewise, in May 2002—approximately five months after filing his intake questionnaire and without having filed a formal charge—Bost, with the other *Bost* plaintiffs, filed suit against FedEx in the Middle District of Florida. *Bost*, 372 F.3d at 1239. One month later, Bost, like Kennedy before him, also filed a formal charge of discrimination with the EEOC. *Id.*

In court, the *Holowecki* and *Bost* suits again proceeded in the same way. Because none of the named plaintiffs in either case had submitted a timely charge of discrimination, FedEx moved to dismiss both suits for failure to exhaust administrative remedies. *See Bost*, 372 F.3d at 1237; *Holowecki*, 440 F.3d at 561. And both the Southern District of New York and the Middle District of Florida granted FedEx's motions, concluding that the intake questionnaires did not constitute charges under the ADEA and, therefore, that none of the named plaintiffs had complied with the ADEA's time-limit requirements under 29 U.S.C. § 626(d). *See Bost*, 372 F.3d at 1237; *Holowecki*, 440 F.3d at 561. Then, the plaintiffs in both cases appealed: the *Holowecki* plaintiffs to the Second Circuit, and the *Bost* plaintiffs to the Eleventh Circuit. And that is where, for the first time, the cases diverged.

In *Bost*, the Eleventh Circuit agreed with the Middle District of Florida that Bost's intake questionnaire did not constitute a charge. 372 F.3d at 1235. The *Bost* court reached this conclusion because the EEOC had not treated Bost's questionnaire as a charge and because there was no evidence that Bost had reasonably believed the questionnaire was sufficient. *Id.* at 1240–41. Instead, the Eleventh Circuit noted, "the undisputed evidence show[ed] the opposite": Bost's subsequent filing of a formal charge showed that he did not believe the questionnaire was a charge; there was no evidence of any misleading communication by the EEOC; and the questionnaire form itself indicated "to a reasonable reader that the questionnaire was not a charge." *Id.* at 1241. Therefore, the Eleventh Circuit affirmed the dismissal of the *Bost* plaintiffs' ADEA claims. *Id.* at 1243.

Despite the likeness of the cases, however, the Second Circuit reached precisely the opposite conclusion in *Holowecki*. It determined that the intake questionnaire submitted by Kennedy constituted a charge merely because it contained the requisite information for a charge—regardless of the fact that the questionnaire had failed to fulfill the notice and conciliation functions of a charge and the complete lack of evidence that Kennedy had believed the questionnaire to be a charge.[11] *Holowecki*, 440 F.3d at 561, 568–69. Therefore, the Second Circuit reversed the dismissal of the *Holowecki* case and remanded for further proceedings. *Id.* at 570.

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[11] In fact, as in *Bost*, the evidence actually showed that Kennedy did not believe her intake questionnaire constituted a charge, as demonstrated by her subsequent completion and submission of a formal charge. *See Holowecki*, 440 F.3d at 569.

The conflicting outcomes of *Bost* and *Holowecki* are even more striking in light of the fact that both circuits purported to use the same test. Since the Third Circuit's decision in *Bihler v. The Singer Co.*, 710 F.2d 96 (3d Cir. 1983), *see supra note* 7, a number of federal circuit courts have used the term "manifest intent" to encapsulate the notion that a document not treated as a charge by the EEOC may suffice as a charge if there are manifestations of intent by the employee to spur the EEOC to initiate its notice-giving and investigatory processes. *See, e.g.*, *Bost*, 372 F.3d at 1240; *Holowecki*, 440 F.3d at 566; *Downes*, 41 F.3d at 1139; *see also Steffen*, 859 F.2d at 544; *Diez*, 88 F.3d at 676–77.

In its decision below, the Second Circuit claimed to adopt the manifest intent test. *See Holowecki*, 440 F.3d at 566–67. Yet it interpreted that test to mean that any document constitutes a charge so long as the employee exhibited an intent to "activate the administrative investigatory and conciliatory processes"—regardless of whether the employee reasonably believed that she had filed a charge. *See Holowecki*, 440 F.3d at 567. This departs from the manifest intent test as applied in *Bost*—as well as that applied in the Seventh and Eighth Circuits—which, though using the same language to describe their inquiry, also considered the reasonable reliance of the employee in believing that the form she submitted constituted a charge. *See Bost*, 372 F.3d at 1241; *see also Steffen*, 859 F.2d at 544; *Diez*, 88 F.3d at 676–77.

The contradictory results in *Bost* and *Holowecki*—based on precisely the same facts and purportedly the same test—flaunt the fundamental disagreement between the circuits on the issue of intake questionnaires. Such inconsistent application of the law will persist unless this Court provides guidance regarding whether and in what circumstances intake

questionnaires and other pre-charge documents may constitute charges for purposes of the ADEA.

III. THIS COURT HAS PREVIOUSLY RECOGNIZED THE IMPORTANCE OF THE QUESTION PRESENTED IN THIS CASE BUT HAS NOT RESOLVED IT.

This Court has never decided whether any document other than a formal charge can nevertheless constitute a charge, as the Second Circuit correctly pointed out below. *See Holowecki*, 440 F.3d at 566 n.5 ("The Supreme Court has not directly addressed the question of whether a written submission to the EEOC that is not on an EEOC charge form is an EEOC charge."). This Court has, however, recognized the importance of the question. In *Edelman v. Lynchburg College*, 535 U.S. 106, 122 S. Ct. 1145, 152 L.Ed.2d 188 (2002), where this Court upheld the EEOC's regulation permitting "an otherwise timely filer to verify a charge after the time for filing has expired," the Court inquired about the charge issue extensively at oral argument. One of the disputes in *Edelman* was whether a letter to the EEOC by the employee describing alleged discrimination constituted a charge for purposes of Title VII. This Court expressed concern that a document that had not been treated as a charge by the EEOC—of which no notice was given to the employer and following which no investigation was instituted—could constitute a charge. Tr. of Oral Arg. 7–8, 10, 13–14, 16–18, 32–33, *Edelman*, 535 U.S. 106 (No. 00-1072). And in its subsequent written opinion, this Court indicated doubt that the letter in *Edelman* was a charge, noting that "at the factual level their view [that the letter was not a charge] has some support." *Edelman*, 535 U.S. at 119.

Ultimately, however, this Court declined to decide the charge issue at that time because it was unclear in *Edelman* whether the EEOC had treated the letter at issue as a charge. Tr. of Oral Arg. 9, *Edelman*, 535 U.S. 106 (No. 00-1072) ("Did the EEOC consider this a charge? We don't know whether it did."); *Edelman*, 535 U.S. at 118–19 ("Our judgment does not . . . reach the conclusion drawn by the District Court, and the single judge on the Court of Appeals, that Edelman's letter was not a charge under the statute because neither he nor the EEOC treated it as one."). Because it was not clear whether the EEOC had treated the letter as a charge, this Court remanded the question of whether it constituted a charge to the Fourth Circuit. *See Edelman*, 535 U.S. at 118–19. On remand, the Fourth Circuit held that the letter was a valid charge, even though the EEOC had not treated it as such and there was no evidence that the employee reasonably believed it sufficed as a charge. *Edelman v. Lynchburg College*, 300 F.3d 400, 404–05 (4th Cir. 2000).

As the Fourth Circuit's post-remand *Edelman* decision and the Second Circuit's decision below demonstrate, this important issue will continue to divide the circuits unless this Court provides guidance. Therefore, this Court should now take the opportunity to decide this crucial question, *see* S. Ct. R. 10(b). And, in determining whether intake questionnaires or other pre-charge documents can ever constitute a charge as envisioned by Congress, the Court should also address what reliance is required by another plaintiff who seeks to piggyback on such a pre-charge document to satisfy his own charge-filing requirement.

CONCLUSION

Because this case presents an important issue of federal law on which the circuits are divided and which has not been, but should be, settled by this Court, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

R. Jeffery Kelsey
Counsel of Record
Edward Efkeman
Federal Express Corporation
Legal Department, Litigation
3620 Hacks Cross Road
Third Floor, Building B
Memphis, TN 38125-8800
(901) 434-8563
(901) 434-8555

Robert K. Spotswood
Kenneth D. Sansom
Emily J. Tidmore
Spotswood Sansom & Sansbury LLC
940 Concord Center
2100 Third Avenue North
Birmingham, AL 35203
(205) 986-3620

Counsel for Petitioner
Federal Express Corporation

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10907

Date: Oct 31, 2006

Docket Number: 04-3376-cv
Short Title: Holowecki v. Federal Express
DC Docket Number: 02-cv-3355
DC: SDNY (NEW YORK CITY)
DC Judge: Honorable Lawrence McKenn

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of October two thousand six.

Holowecki v. Federal Express

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Federal Express Corp. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular

active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/ _____
Motion Staff Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 04-3376-cv

[Filed March 8, 2006]

PAUL HOLOWECKI, PATRICIA KENNEDY, DONNA M. LEWIS, CHARLES MONCALIERI, PHYLLIS NELSON, ANDY KUBICKI, ELIZABETH TUCKER, STEVEN ALMENDAREZ, FRANK J. MARTINEZ, KELLY L. MARTINEZ, KEVIN McQUILLAN, KENNETH G. MUTCHLER, GEORGE ROBERTSON, NANCY THOMPICS, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

FEDERAL EXPRESS CORPORATION,
Defendant-Appellee.

Before: KEARSE, CALABRESI, and POOLER, *Circuit Judges*.

Plaintiffs, current and former employees of defendant, appeal from the October 23, 2002, judgment of the United

States District Court for the Southern District of New York (McKenna, J.) dismissing their age discrimination claims, based on federal and state law, for failure to file timely charges with the Equal Employment Opportunity Commission, *see* 29 U.S.C. § 626(d).

Reversed in part, vacated in part, and remanded.

DAVID L. ROSE (David M. Wachtel, on the brief), Rose & Rose, P.C., Washington, DC, for *Plaintiffs-Appellants*.

R. JEFFERY KELSEY, Memphis, TN, for *Defendant-Appellee*.

OPINION

POOLER, *Circuit Judge*.

Appellants, who are all at least 40 years of age and are currently or were formerly employed as couriers for appellee Federal Express Corporation ("FedEx"), filed an April 30, 2002, complaint on behalf of themselves and other similarly situated FedEx couriers, claiming that FedEx had engaged in a pattern and practice of employment procedures that discriminate based on age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, the New York State Human Rights Law ("NYHRL"), N.Y. Exec. Law §§ 290 *et seq.*, and the laws of several other states. The United States District Court for the Southern District of New York (McKenna, J.) dismissed the claims as time-barred, concluding that each named plaintiff failed to comply with the ADEA's time limit requirements under 29 U.S.C. § 626(d).

We disagree with the district court's dismissals of the plaintiffs' claims. Specifically, we hold that plaintiff Patricia Kennedy's Intake Questionnaire and accompanying verified affidavit, filed with the Equal Employment Opportunity Commission ("EEOC"), constituted an EEOC "charge" that satisfactorily fulfilled the ADEA's exhaustion requirements even though the EEOC never notified, or investigated, the employer. Furthermore, we conclude that Kennedy's EEOC charge was sufficient to permit the eleven named plaintiffs that *never* filed EEOC charges to take advantage of the "single filing" or "piggybacking" rule and thereby satisfy the ADEA's exhaustion requirements.

Finally, with respect to plaintiffs George Robertson and Kevin McQuillan, two individuals who *did* individually file administrative charges and received right-to-sue letters, we conclude that the district court erred in determining that these plaintiffs did not file their charges within 300 days after the alleged unlawful practice occurred, as is required by 29 U.S.C. § 626(d). We remand, however, for the district court to decide in the first instance whether the complaint, fleshed out by Robertson's affidavit, was sufficient to withstand a motion dismiss based on the ADEA's requirement that a claimant who receives a right-to-sue letter must bring suit in federal court within 90 days of receipt of the letter. *See* 29 U.S.C. § 626(e). Accordingly, we reverse in part, vacate in part, and remand for further proceedings in accordance with this opinion.

BACKGROUND

This case requires us to consider various time limits imposed on plaintiffs seeking to sue their employer under the ADEA. Appellants (also referred to as "Holowecki plaintiffs"), residents of several states, filed an April 30,

2002, complaint on behalf of themselves and other similarly situated FedEx couriers. The complaint alleged, *inter alia*, that, through policies initiated in 1994 and 1995—such as "Best Practices Pays" ("BPP") and "Minimum Acceptable Performance Standards" ("MAPS")—and through a pattern and practices that continued thereafter, FedEx had discriminated based on age. The Holowecki plaintiffs contended that BPP, MAPS, and related policies were intended to encourage older workers to leave the company before they wished to retire and to mask FedEx's efforts to terminate older workers based on age discrimination.

According to the complaint, for instance, after the initial implementation of the BPP and MAPS, FedEx continued to increase performance goals and apply these new goals in a way that discriminated against older couriers. For instance, at first, FedEx required that a courier work with her supervisor to agree upon "a reasonable and safe number of stops per hour on the courier's route that could reasonably be achieved." If the courier achieved this goal, she would receive enhanced pay for one pay period. "Over time, however, [FedEx] treated the goals as the minimum acceptable number of stops that older couriers were required to make to retain their positions. . . . [F]ailure of a courier to achieve that number was grounds for a 'performance reminder' and then disciplinary action up to and including termination." Older couriers, according to the complaint, were more often "written up" for occasional failures to meet these goals and "younger couriers were rarely disciplined for such matters." Furthermore, pursuant to these policies, any absence of more than 90 days became grounds for termination from employment. The complaint alleged a series of additional discriminatory practices based on age and claimed that these policies led to the termination and constructive discharge of a disproportionately high percentage of older couriers.

The district court dismissed the Holowecki plaintiffs' complaint without reaching the merits, ruling that all fourteen named plaintiffs failed to satisfy the ADEA's time limit requirements, *see* 29 U.S.C. § 626, and declining to exercise supplemental jurisdiction over plaintiffs' state law claims. Under 29 U.S.C. § 626(d) ("Section 626(d)"), an aggrieved person must file an EEOC charge at least 60 days *prior to* initiating an ADEA suit in federal court. In addition, if the allegedly discriminatory act occurs in a "deferral state," a state that has its own age discrimination law and its own age discrimination remedial agency, the charge must be filed within the earlier of 300 days after the alleged unlawful practice occurred or thirty days after a complainant receives notice of the termination of state law proceedings. *See* 29 U.S.C. § 626(d); *Id.* § 633(b); *Hodge v. New York Coll. of Podiatric Med.*, 157 F.3d 164, 166 (2d Cir. 1998). It is undisputed that all of the states relevant to this action are deferral states.[1]

Unlike Title VII, the ADEA does not require an aggrieved party to receive a right-to-sue letter from the EEOC before filing suit in federal court. *Compare* 29 U.S.C. § 626(d)-(e) *with* 42 U.S.C. § 2000e-5(e)-(f); *see Hodge*, 157 F.3d at 168 ("Whereas Title VII plaintiffs must receive a 'right-to-sue' letter from the EEOC before filing suit in court . . . ADEA plaintiffs need only wait 60 days after filing the EEOC charge."); *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1057 (2d

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[1] *See, e.g., Bost v. Federal Express Corp.*, 372 F.3d 1233, 1238 (11th Cir. 2004) (noting that Florida is a deferral state); *Casteel v. Executive Bd. of Local 703 of Int'l Bhd. of Teamsters*, 272 F.3d 463, 466 (7th Cir. 2001) ("Illinois is a deferral jurisdiction."); *Hodge v. New York Coll. of Podiatric Med.*, 157 F.3d 164, 166 (2d Cir. 1998) ("New York is a 'deferral state.'").

Cir. 1990).[2] However, in the event that the EEOC issues a right-to-sue letter to an ADEA claimant, the claimant must file her federal suit within 90 days after receipt of the letter. *See* 29 U.S.C. § 626(e); *see also Julian v. City of Houston*, 314 F.3d 721, 726 (5th Cir. 2002) (acknowledging that Section 626(e) "establishes a ninety-day limitations period for the ADEA complainant who actually receives notice from the EEOC, [but] does not require a complainant to receive such notice before filing suit.").

While the ADEA's time limit requirements are subject to equitable modification or estoppel, *Dillman v. Combustion Eng'g, Inc.*, 784 F.2d 57, 59 (2d Cir. 1986), ADEA time limits "are not to be disregarded by courts out of a vague sympathy for particular litigants," *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984).

Three of the named Holowecki plaintiffs filed charges with the EEOC or an authorized state agency (collectively referred to as "EEOC") before bringing suit in federal court and eleven did not. Plaintiff Kennedy, a resident of Florida, filed an EEOC Intake Questionnaire form and accompanying verified affidavit on December 3, 2001, and an EEOC charge form on May 30, 2002. Kennedy did not receive a right-to-sue letter in conjunction with either of these filings. The verified affidavit, accompanying the Intake Questionnaire form, consisted of over four pages of text and alleged that FedEx had instituted a number of policies and practices that

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[2] In dicta, this court has stated that the ADEA requires a claimant to obtain a right-to-sue letter before bringing suit in federal court. *See Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir. 2001) (per curiam). In the ADEA context, the only requirement is that a claimant must bring suit in federal court within 90 days *if* she receives a right-to-sue letter.

discriminated based on age. It stated, for instance, that "as a result of [the Best Practice Pays] policy and procedure changes," FedEx had "fired and/or constructively terminated" older couriers and had otherwise discriminated against older couriers. Moreover, it named several practices, such as FedEx's goals with respect to the number of stops per hour, that had increasingly gotten worse since the initiation of the BPP and MAPS.

The district court determined (1) that Kennedy's EEOC Intake Questionnaire and affidavit was not an EEOC "charge" and therefore did not satisfy Section 626(d)'s requirement that a claimant file a charge before bringing suit in federal court, and (2) that Kennedy's May 30, 2002, EEOC charge form was untimely because it was not filed 60 days prior to filing the April 30, 2002, ADEA complaint in federal court. *See* 29 U.S.C. § 626(d). Appellee does not dispute that Kennedy's EEOC Intake Questionnaire form and accompanying affidavit would satisfy the 60 and 300 day time limits set out in 29 U.S.C. § 626(d)[3] if we consider them to be an EEOC charge. In appellee's view, however, the EEOC Intake Questionnaire and accompanying affidavit do not satisfy Section 626(d) because they are not properly considered to be an EEOC "charge."

Plaintiff Robertson, a resident of Illinois, filed an EEOC charge on December 1, 2000, and plaintiff McQuillan, a resident of New York, filed an EEOC charge on September 11, 1998. Although there was no question as to whether these constituted EEOC "charges" or as to whether these were filed 60 days prior to the initiation of the April 30, 2002 federal

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[3] As mentioned above the 90-day time limit is not relevant because Kennedy did not receive a right-to-sue letter.

complaint, the district court found that they failed to meet the Section 626(d) requirement that the EEOC charge be filed within 300 days after the occurrence of the allegedly discriminatory acts. Appellee argued below that these two plaintiffs, both of whom received right-to-sue letters from the EEOC, failed to satisfy the requirement that they bring their April 30, 2002 federal suit within 90 days of receipt of the letters. *See* 29 U.S.C. § 626(e). After McQuillan filed his September 11, 1998 charge, the EEOC issued a right-to-sue letter on June 11, 1999.

Appellee argues that Robertson's right-to-sue letter was *received* on or about April 25, 2001, but Robertson states, "under penalty of perjury," that it was *received* shortly after February 7, 2002, and thus satisfies Section 626(e) because it was received within 90 days of the April 30, 2002 federal suit. After Robertson filed his December 1, 2000, charge with the EEOC, providing a Lake Villa, Illinois address, the EEOC sent Robertson a right-to-sue letter, dated April 25, 2001. According to Robertson's declaration, submitted to the district court in opposition to appellee's motion to dismiss,[4] he moved from Lake Villa in March of 2001 and requested that the United States Postal Service forward his mail. The April 25, 2001, right-to-sue letter, however, somehow did not reach Robertson. In January or February of 2002, Robertson contacted the EEOC because he had not heard anything since the filing of his charge. In response, on February 7, 2002, the EEOC sent Robertson the April 25, 2001 right-to-sue letter.

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[4] On August 6, 2002, plaintiffs filed an unsigned copy of Robertson's declaration with the district court as an exhibit to their Memorandum in Opposition to the Defendant's Motion to Dismiss the Complaint. Subsequently, on August 14, 2002, plaintiffs filed a signed version of Robertson's declaration with the district court.

According to the record, eleven of the Holowecki named plaintiffs never filed anything approximating an EEOC charge. These non-filing plaintiffs claimed that their suit nonetheless did satisfy ADEA time limit requirements because of the single filing, or "piggybacking," rule. According to the piggybacking rule, "where one plaintiff has filed a timely EEOC complaint, other non-filing plaintiffs may join in the action if their individual claims aris[e] out of similar discriminatory treatment in the same time frame." *Snell v. Suffolk County*, 782 F.2d 1094, 1100 (2d Cir. 1986) (internal quotation marks omitted). In cases such as this, when the allegedly discriminatory activity affects a large group, piggybacking is not allowed unless the filed charge provides "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim." *Tolliver*, 918 F.2d at 1058.

An individual who has previously filed an EEOC charge cannot piggyback onto someone else's EEOC charge. *See Levy v. United States Gen. Accounting Office*, 175 F.3d 254, 255 (2d Cir. 1999) (per curiam) (holding that individuals who filed administrative charge but failed to file federal suit within 90 days of receipt of right-to-sue letter as required by the ADEA could not take advantage of single filing rule); *see also Snell*, 782 F.2d at 1100 (stating that "non-filing plaintiffs" can take advantage of the rule). As noted by other Circuit Courts of Appeals, allowing an individual who has previously filed a charge to abandon that charge and piggyback onto the charges of another individual would too often frustrate the EEOC's statutorily-mandated efforts to resolve an individual charge through informal conciliation. *See, e.g., Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 557-58 (11th Cir. 1997) (quoting *Anderson v. Unisys Corp.*, 47 F.3d 302, 308-09 (8th Cir. 1995)). The Fifth Circuit Court of Appeals has stated, for instance that, "where the party wishing to

piggyback has filed his own EEOC charge," he is "bound by the parameters of his own EEOC charge, and cannot subsequently utilize the single filing rule to avoid the statute of limitations." *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1223-24 (5th Cir. 1995) (abrogated on other grounds). We agree with this analysis.

The eleven non-filing plaintiffs (also referred to as "the piggybacking plaintiffs") present three piggybacking theories on appeal, all of which the district court rejected. They argue that they can piggyback onto (1) Kennedy's December 3, 2001, EEOC Intake Questionnaire and accompanying affidavit or (2) Robertson's December 1, 2000, EEOC charge, both of which, in their view, satisfy the ADEA's time limit requirements. Additionally, the piggybacking plaintiffs contend that they can piggyback onto timely EEOC charges filed by parties to a separate Florida lawsuit that was dismissed prior to the initiation of this claim, *Freeman v. Federal Express Corp.*, No. 99-2466 (M.D. Fla. Sept. 25, 2000), *aff'd*, 2002 WL 187185 (11th Cir. Jan. 14, 2002), because the charges filed by those individuals put the EEOC and FedEx on notice about its allegedly nationwide discriminatory practices. None of the *Freeman* plaintiffs are parties to the *Holowecki* suit. None of the Holowecki named plaintiffs were parties to the Florida lawsuit, although some of them unsuccessfully tried to join in an amended *Freeman* complaint that the Florida district court dismissed as moot. *See Bost v. Federal Express Corp.*, 372 F.3d 1233, 1236-37 (11th Cir. 2004) (describing procedural history of *Freeman* litigation).

DISCUSSION

We construe the district court's ruling as a dismissal for failure to state a claim under Federal Rule of Civil Procedure

12(b)(6) rather than a dismissal for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Rule 12(b)(1) does not apply because the ADEA's time limits, which are subject to equitable modification, are not jurisdictional in nature. *See Dillman*, 784 F.2d at 59 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n.11 (1982)). We review a 12(b)(6) dismissal for failure to state a claim de novo. *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325, 327 (2d Cir. 2005) (per curiam). When deciding whether plaintiffs satisfy the ADEA's time limit requirements, we accept all of plaintiffs' factual allegations as true and will only affirm the district court's dismissal if we are satisfied that plaintiffs can prove no set of facts that would entitle them to relief on their claims. *See Velez v. Levy*, 401 F.3d 75, 84 (2d Cir. 2005).

In reviewing the Rule 12(b)(6) ruling, it is proper for this court to consider the plaintiffs relevant filings with the EEOC and the declaration that Robertson submitted to the district court, none of which were attached to the complaint, because the Holowecki plaintiffs' rely on these documents to satisfy the ADEA's time limit requirements. "[W]hen a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint, the court may nevertheless take the document into consideration in deciding the defendant's motion to dismiss, without converting the proceeding to one for summary judgment." *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (internal quotation marks omitted).

I. Kennedy's EEOC Intake Questionnaire and Affidavit

Both Kennedy and the piggybacking plaintiffs argue that, based on the circumstances of this case, Kennedy's EEOC Intake Questionnaire and accompanying affidavit constitute an

EEOC "charge." Accordingly, they contend, it is timely in accordance with 29 U.S.C. § 626(d) because it is a "charge" that satisfies both the 60 day and 300 day time limits. The piggybacking plaintiffs further argue that the scope of Kennedy's charge is sufficient to incorporate their age discrimination claims, thereby permitting them to piggyback. We agree on both accounts and reverse the district court's dismissal of these plaintiffs' claims.

A. Meaning of EEOC "Charge"

In order to decide whether Kennedy's EEOC Intake Questionnaire and accompanying affidavit constitutes an EEOC charge we first turn to the meaning of the statutory term "charge." The ADEA requires the filing of a timely charge with the EEOC but does not define the term "charge."[5] *See* 29 U.S.C. § 626(d). The EEOC has established interpreting regulations that specify the requisite information that must appear in a "charge." *See* 29 C.F.R. §§ 1626.3, 1626.6, 1626.8. The required content is minimal. For instance, a charge "is sufficient" when the EEOC receives "a . . . writing" (or information that an EEOC employee reduces to a writing) from the person making the charge that names the employer and generally describes the allegedly discriminatory acts. *See id.* § 1626.8(b) (citing *id.* § 1626.6). According to the regulations, a charge also "should contain," but is not required to contain, other information such as the full contact information for the

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[5] The Supreme Court has not directly addressed the question of whether a written submission to the EEOC that is not on an EEOC charge form is an EEOC charge. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 118 (2002) (declining, in a case involving Title VII, to reach the question of whether or not claimant's filing of unsworn statement to EEOC constituted a "charge").

employer and the individual filing the charge, and a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." *See id.* § 1626.8(a)(1)-(5).

Some Circuits have imposed an additional requirement, the "manifest intent" rule, that is not explicitly stated in the statute or interpreting regulations. According to these courts, for a written submission to the EEOC to constitute a "charge," it must manifest an individual's intent to have the agency initiate its investigatory and conciliatory processes. An oft-cited proposition of the Third Circuit is that "[i]n order to constitute a charge that satisfies the requirement of section 626(d), notice to the EEOC must be of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act's machinery." *Bihler v. Singer Co.*, 710 F.2d 96, 99 (3d Cir. 1983); *see Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1319 (11th Cir. 2001) (citing proposition favorably); *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 542 (7th Cir. 1988) (same).

We agree with this proposition and hold that a writing submitted to the EEOC containing the information required by EEOC interpreting regulations is an EEOC "charge" for purposes of Section 626, only when the writing demonstrates that an individual seeks to activate the administrative investigatory and conciliatory process. We also agree that "notice to the EEOC must be of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act's machinery." *Bihler*, 710 F.2d at 99.

This interpretation of the meaning of "charge" recognizes that providing the EEOC with an opportunity "to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of [the ADEA]

through informal methods of conciliation, conference, and persuasion," 29 U.S.C. § 626(b), is "an essential element" of the ADEA's statutory scheme, *cf. Francis v. City of New York*, 235 F.3d 763, 768 (2d Cir. 2000) ("[E]xhaustion of administrative remedies through the EEOC [is] 'an essential element of Title VII's statutory scheme.'"). Receiving a charge provides the EEOC with an opportunity to notify the prospective defendants and seek conciliation. *See Tolliver*, 918 F.2d at 1057; *see also Dezaio v. Port Auth. of N.Y. & N.J.*, 205 F.3d 62, 65 (2d Cir. 2000). Without notice from the complainant, the EEOC is not provided with an opportunity to fulfill this statutory purpose. *See Schroeder v. Copley Newspaper*, 879 F.2d 266, 269 (7th Cir. 1989) ("'The efficient operation of the [EEOC] demands such notice' because 'Congress certainly did not intend the [EEOC] to squander its resources by investigating where no complaint has been filed.'") (quoting *Bihler*, 710 F.2d at 99).

While we fully recognize that administrative exhaustion is an important aspect of the ADEA, if an individual satisfactorily notifies the EEOC of her charge, she is not foreclosed from federal suit merely because the EEOC fails to follow through with notifying the employer and attempting to resolve the matter through "conciliation, conference, and persuasion." 29 U.S.C. § 626(b). To require this would be to hold individuals accountable for the failings of the agency. Moreover, we see no reason to require that the EEOC have provided misleading information to a complainant about the status of her charge. Regardless of what the EEOC communicates or fails to communicate to a party, a written filing that complies with the ADEA and contains the information required by EEOC interpreting regulations is an EEOC "charge" as long as it demonstrates a party's intent to activate the administrative process.

This Court has recognized, in the ADEA context, that it is not required that the EEOC has actually taken action before an individual, who otherwise satisfactorily filed a charge, can bring suit in federal court. *Hodge*, 157 F.3d at 167-68. In *Hodge*, we allowed a federal ADEA suit to go forward even though the EEOC had not terminated its investigation. In that case, the investigation of the charge had been held up due to the withdrawal of plaintiff's initial administrative charge pursuant to an agreement that was later deemed invalid. *Id.* We concluded that plaintiff need not re-file a charge or seek to reopen the administrative proceedings. *Id.* Since the EEOC had the charge for more than the "60-day period that Congress established for the EEOC to investigate or attempt conciliation before the ADEA plaintiff is allowed to file suit in court," we saw "no statutory purpose to be served by a refiling or reopening requirement, the effect of which would be the imposition of additional delays, including another 60-day waiting period." *Id.* at 168. We cited *Bihler*, 710 F.2d at 99 n.7, for the proposition that "[s]uch a holding would establish a prerequisite to suit beyond a prospective plaintiff's control and therefore would be contrary to the spirit and purpose of the Act." *Hodge*, 157 F.3d at 168. This reasoning equally applies when an individual has manifested her intent to activate the administrative process. A complainant should not be held accountable if the EEOC fails to follow through after that complainant has provided written notice to the EEOC "that would convince a reasonable person" that she intends "to activate the Act's machinery," *Bihler*, 710 F.2d at 99.

B. Kennedy's EEOC Questionnaire as EEOC Charge

Now that we have described the requirements for an EEOC "charge" we turn to the particular circumstances of this case. Kennedy filed her EEOC Intake Questionnaire and

accompanying affidavit ("questionnaire") with the EEOC on December 3, 2001, more than 60 days *prior to* initiating this suit on April 30, 2002, and alleged discriminatory acts that occurred within 300 days of the filing of the questionnaire. *See* 29 U.S.C. § 626(d). The relevant question on appeal is whether this otherwise timely filing with the EEOC constituted a "charge." We conclude that Kennedy's questionnaire constituted an EEOC "charge" because (1) its content satisfied the statutory and regulatory requirements for what content must be included in a charge, and (2) the questionnaire communicated Kennedy's intent to activate the EEOC's administrative process.

First, Kennedy's questionnaire satisfies the EEOC's interpreting regulations specifying the required content that must appear in a "charge." *See* 29 C.F.R. §§ 1626.3, 1626.6, 1626.8(b). By stating that FedEx was discriminating against her and others because of their age, Kennedy's questionnaire certainly alleged that the defendant had engaged in "actions in violation of the Act," as is required by 29 C.F.R. § 1626.3. Moreover, the questionnaire form and accompanying four-page verified affidavit, were a "writing" that named the employer and generally described the alleged discriminatory act, as is required by 29 C.F.R. §§ 1626.6 and 1626.8(b). The affidavit detailed numerous instances of alleged discrimination, such as FedEx's implementation of various aspects of the "Best Practices Pays" and "Minimum Acceptable Performance Standards" programs. It also contained much of the content suggested by, but not required by, the regulations. *See* 29 C.F.R. § 1626.8(a). For instance, the questionnaire contained the full contact information for Kennedy and her employer, pertinent dates, the approximate number of employees at her workplace, and indicated that she had not filed any other complaint against this employer. *See* 29 C.F.R. § 1626.8(a)(1)-(5).

Second, the content of the questionnaire evidenced Kennedy's intent to activate the administrative process. The forceful tone and content of the affidavit should have alerted the EEOC that the filing was meant to be an EEOC "charge." For instance, the affidavit states that, in years past, Kennedy has "threatened to stand up for [her] rights" but that "[i]n the past several months" she had "come to realize that by doing nothing" she had allowed FedEx to continue its discriminatory practices against her. As further indication that Kennedy intended to activate the administrative process, by checking the "consent" box on the questionnaire form, Kennedy consented to the disclosure of her identity to the employer that allegedly discriminated against her. This demonstrates Kennedy's desire to move the investigatory and conciliatory process forward. Moreover, the EEOC form, on which Kennedy submitted her affidavit, itself indicated that the case was currently "open," also suggested that her filing would be sufficient to initiate the administrative process. Finally, and perhaps most tellingly, the affidavit unambiguously states, "[p]lease force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created within their application of *Best Practice Pays/High-Velocity Culture Change*." In light of these facts, we conclude that Kennedy provided written notice to the EEOC "that would convince a reasonable person" that Kennedy intended "to activate the Act's machinery," *see Bihler*, 710 F.2d at 99. The EEOC erred by failing to act in response to Kennedy's manifested intent.

FedEx argues that the fact that Kennedy later filled out an actual EEOC charge form indicates that her earlier intention was not to file a "charge." Some courts have followed this logic to some extent. *See Bost*, 372 F.3d at 1241; *Diez v. Minnesota Mining & Mfg. Co.*, 88 F.3d 672, 677 (8th Cir.

1996). There is nothing in the record, however, that indicates that Kennedy, by also filing a charge form, was doing anything more than supplementing her earlier charge, or acting out of a surfeit of caution. Therefore, based on the circumstances of this case, we conclude that the content of Kennedy's questionnaire sufficiently demonstrated her intent to activate the administrative process and her later filing of an EEOC charge form does not compel us to find otherwise.

Having established that the questionnaire in this case was a "charge," we turn to the piggybacking plaintiffs' theory that they can use Kennedy's charge to satisfy the ADEA's time limit requirements because Kennedy's affidavit identified discriminatory treatment that is similar to the acts described in the complaint and alleges that a large group of workers have experienced similar discrimination. *See Tolliver*, 918 F.2d at 1056-58. We agree with this theory.

Like the Holowecki complaint, Kennedy's questionnaire described the allegedly discriminatory policies, such as the Best Practices Pays, Minimum Acceptable Performance Standards, and other discriminatory practices, in detail. Kennedy's questionnaire also provided notice that the policies were affecting a wide range of FedEx employees. The affidavit stated, for instance, that the Best Practice Pays policy "has systematically targeted myself and others." **[A. 158]** Moreover, it stated that "management has continually picked at me and other older couriers emotionally and financially by changing our 'start times'" and that Kennedy knew she was "not alone" because "many older couriers" shared her "doubts and fears." Kennedy concluded by stating that FedEx must be forced to stop its discriminatory policies so that "we can finish out our careers" absent discriminatory practices.

Because we agree that the piggybacking plaintiffs can piggyback onto Kennedy's charge, there is no reason for this court to address the two other piggybacking theories presented on appeal. Therefore, we are left only to deal with the two remaining named plaintiffs who individually filed administrative charges with the EEOC.

II. Robertson's EEOC Charge

It is undisputed that Robertson's charge was filed more than 60 days prior to the initiation of the Holowecki suit.[6] The district court held, however, that the Robertson charge was nonetheless untimely under Section 626(d) because it was filed more than 300 days after the implementation of the allegedly discriminatory policies alleged in the complaint. Specifically, the district court found the charge untimely because it was submitted "over six years after plaintiffs claim the policies were implemented." Appellee also challenges the Robertson charge on an additional timeliness ground not specifically addressed in the district court's opinion, arguing that Robertson did not file suit in federal court within 90 days of his receipt of a right-tosue letter, in violation of Section 626(e). We find that, if we accept the allegations in the complaint as true, Robertson's charge was not filed more than 300 days after the implementation of the discriminatory policies alleged, and we therefore vacate the district court's dismissal of his claim on that basis. However, because it was not reached below, we remand for the district court to address whether Robertson's suit was untimely because it was not filed within 90 days of receiving the right-to-sue letter.

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[6] Robertson's charge was filed on January 2, 2001, and the Holowecki suit was filed April 30, 2002.

Robertson's charge unambiguously included references to allegedly discriminatory practices that took place within the 300-day period and did not even mention any particular FedEx policies or acts that were initiated more than 300 days before the filing of the charge. Instead Robertson's January 2, 2001, charge alleged that FedEx refused to allow Robertson to take accrued leave in August 2000, and terminated him on September 8, 2000, based on age and disability discrimination. Both of these acts occurred less than 300 days *before* Robertson filed his January 2, 2001, charge. The district court's reference to alleged discriminatory acts that occurred outside the 300-day period is simply a misreading of the allegations in the complaint. We therefore vacate the district court's dismissal on the basis that Robertson's charge was untimely, and remand for the district court to consider whether Robertson filed suit within 90 days of receiving the right-to-sue letter.

III. McQuillan's EEOC Charge

As with Robertson, we disagree with the district court's determination that McQuillan failed to file within 300 days after the alleged unlawful practice occurred. McQuillan's charge, which was signed on September 11, 1998, challenges his termination from employment, which occurred on March 31, 1998. There is no doubt that the charge described acts that allegedly occurred within the required 300-day period. Because we vacate the district court's dismissal of McQuillan's claim on this ground, we remand for the district court to consider in the first instance appellee's argument that McQuillan's suit was not filed within 90 days of receiving the right-to-sue letter.

CONCLUSION

The judgment of the district court is reversed with respect to all of the named plaintiffs, except Robertson and McQuillan. The district court's dismissal of Robertson's and McQuillan's claims is vacated. The case is remanded for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02-CV-3355

[Filed May 4, 2004]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Trompics, individually and on behalf of all others similarly situated,
Plaintiff,

v.

Federal Express Corporation,
Defendant.

MARGINAL ENTRY ORDER

Motion Denied. So Ordered.

/s/ Judge Lawrence M. McKenna
USDJ 5/4/04

NOTICE OF MOTION AND MOTION TO ALTER OR AMEND THE MEMORANDUM AND ORDER OF OCTOBER 9, 2002

PLEASE TAKE NOTICE THAT plaintiffs, by their attorneys, move under Rule 59(e), Fed. R. Civ. P., for an order modifying and vacating the memorandum and order dated October 9, 2002, granting the defendant's motion to dismiss, and dismissing the Complaint, without leave to file an amended complaint or other pleading.

1. This motion is based upon the decision of the Supreme Court in *Edelman v. Lynchburg College*, 122 S. Ct. 1145 (March 19, 2002), on remand, *Edelman v. Lynchburg College*, 300 F.3d 400 (4th Cir. 2002) and the regulations of the EEOC which define what kind of writing constitutes a charge of discrimination. 20 C.F.R. 1601.12(b)(Title VII reg); and 29 C.F.R. 29 C.F.R. 1626(b)(ADEA regs.).

Under the Supreme Court's decisions in *Edelman v. Lynchburg College, supra* and the lawful regulations of the EEOC, the questionnaire and affidavit of Patricia Kennedy was a charge in December, 2001, when received by the EEOC. Compare, Memo. and Order of Oct. 9, 2002 at pages 8-10. Under the lawful regulations, therefore, she filed her charge more than 60 days before filing of this suit. The ruling of this Court at pages 8-10 is therefore inconsistent with the *Edelman* decision, *supra*, and the valid EEOC regulation and should be vacated or altered.

2. This Court ruled in the Memo. and Order that the charges of Robertson and (perhaps) Kennedy were untimely, because they were not filed within 300 days of the commencement of the alleged unlawful discriminatory practices. Memo. at p. 8. However, the Complaint alleges

that the age discriminatory practices of Federal Express that commenced in 1994, has followed those practices "each year" since that time, and that they "are the prevailing pattern or practice of Federal Express" and that "Federal Express has continued to follow that pattern or practice to the present..." and that "Unless restrained by order of this Court the defendant will continue to pursue ...policies and practices alleged in the Complaint." Paras.23, 24 and 30. Each time an older worker is injured by an age discriminatory practice of Federal Express, that worker suffered a wrong "actionable under" the law "regardless of the fact that this pattern was begun" more than 180 or 300 days before the charge was filed *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986); *National Passenger R. Corp. v. Moragan*, ___ U.S. ___, 122 S. Ct. 2061, 2071 (2002).

3. The Second Circuit has ruled that the opt in procedure applies to actions by individuals as well as to class actions, and that individuals who did not file charges may prosecute another action under the single filing rule, if a charge of a non-party gave notice to EEOC of the employer-wide nature of the allegations. *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1055-1060 (2d Cir. 1990), *cert. den.* 499 U.S. 983. The district court attempted to distinguish that case on the ground that in that case there was a class certification and then a decertification, while in the *Freeman* case (at issue here) there was no class certification. Memo. at pp. 11-12.

However, the language of reasoning of the Second Circuit in *Tolliver, supra*, is incompatible with that distinction, for it expressly recognized that the "opt n" procedures specified in the ADEA are applicable in "individual suits" as well as in class actions, and they permit persons who did not file a charge to bring suit, so long as the EEOC was given notice by an earlier charge. *Tolliver, supra*, 918 F.2d at 1057. The

district court erred in failing to apply the decision in *Tolliver* to the case at bar.

In any event the defendant has the burden on the affirmative defense of the untimeliness of a charge, and plaintiffs should be allowed discovery before any such defense is acted upon by this court.

This motion is based upon the allegations of the Complaint, and the exhibits of record. A memorandum of points and authorities and a proposed Order are submitted herewith.

For the reasons set forth above, and set forth more fully in the memorandum of points and authorities in support of this motion, the motion should be granted, and the Court should enter an order of the kind submitted herewith.

Respectfully submitted,

/s/

David L. Rose (DLR 8716)
David M. Wachtel (DMW 1269)
Rose & Rose, P.C.
1320 19th Street NW
Suite 601
Washington, DC 20036
(202) 331-8555
(202) 331-0996 (fax)

Renee Steinhagen (RS 4209)
Attorney at Law
744 Broad Street
16th Floor
Newark, NJ 07102
(212) 254-6996
Attorneys for Plaintiffs

October 23, 2002

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

02 CIVIL 3355(LMM)

[Filed October 23, 2002]

PAUL HOLOWECKI, et.al.,	)
Plaintiff,	)
	)
-against-	)
	)
FEDERAL EXPRESS CORP.,	)
Defendants.	)
	)

JUDGMENT

Defendant having moved to dismiss pursuant to FRCP 12(b)(1) & (6), and the matter having come before the Honorable Lawrence M McKenna, United States District Judge, and the Court, on October 8, 2002, having rendered its Memorandum and Order granting defendant's motion to dismiss plaintiffs' ADEA claims without leave to replead, and declining to exercise jurisdiction over the state law claims, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dated October 8, 2002, defendant's motion to dismiss

plaintiffs' ADEA claims is hereby granted without leave to replead and the Court declines to exercise jurisdiction over the state law claims.

DATED: NYC, NY
October 23, 2002

JAMES M. PARKISON

Clerk of Court

BY:

/s/ James M. Parkison
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

02 Civ. 3355(LMM)

[Filed October 9, 2002]

Paul Holowecki, Patricia Kennedy, Donna M. Lewis, Charles Moncalieri, Phyllis Nelson, Andy Kubicki, Elizabeth Tucker, Steven Almendarez, Frank J. Martinez, Kelly L. Martinez, Kevin McQuillan, Kenneth G. Mutchler, George Robertson, and Nancy Trompics, individually and on behalf of others similarly situated,
Plaintiff,

v.

FEDERAL EXPRESS CORPORATION,
Defendant.

JUDGES: Lawrence M. McKenna, U.S.D.J.

MEMORANDUM AND ORDER

McKENNA, D.J.

Plaintiffs Paul Holowecki, et al. ("plaintiffs")[1] bring this action against their employer or former employer, defendant Federal Express Corporation ("Federal Express"), alleging age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA"), the New York Human Rights Law ("NYHRL"), and the laws of California, Florida, Illinois, Michigan, and New Jersey. Federal Express moves to dismiss the complaint, which was filed on April 30, 2002, under Federal Rules of Civil Procedure 12(b)(1)("Rule 12(b)(1)") and 12(b)(6) ("Rule 12(b)(6)") on the grounds that plaintiffs' claims are time-barred under 29 U.S.C. § 626(d). For the reasons set forth below, the Court grants the motion.

BACKGROUND

Plaintiffs, who are at least 40 years of age, are or were employed by Federal Express as couriers. (Compl. ¶ 6.) They bring this suit on behalf of themselves and others similarly situated. (*Id.*)

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[1] In the complaint, plaintiff Nancy Trompics's name is misspelled as Nancy Thompics. Plaintiffs subsequently corrected the caption in their opposition to defendant's motion to dismiss. Federal Express now argues that plaintiffs violated Federal Rule of Civil Procedure 15 by not requesting leave of the court before amending the caption. The Court treats plaintiffs' correction of the caption as a request to amend and finds the requirements of Rule 15 satisfied. *See* Fed. R. Civ. P 15(a) ("leave [to amend] shall be freely given when justice so requires."); *Arfons v. E.I. Du Pont De Nemours & Co.*, 261 F.2d 434, 435 (2d Cir. 1958) ("It is now well established that dismissals for mere technical defects or ambiguities in pleadings are not favored.").

Federal Express is a corporation engaged in the transportation of packages by air and ground throughout the United States and elsewhere. (*Id.* ¶ 3.) Federal Express is an employer within the definition and coverage of 29 U.S.C. § 630(b) of the ADEA, the New York Human Rights law, and other state laws prohibiting age discrimination. (*Id.* ¶ 5.)

Prior to this action, two of the plaintiffs, Kevin McQuillan ("McQuillan") and George Robertson ("Robertson") filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"). (Morrison Decl. ¶¶ 5-7.) McQuillan filed a charge with the EEOC alleging age discrimination on September 11, 1998. (*Id.*, Ex. 3.) The EEOC found no cause to believe discrimination had occurred and issued a notice of right to sue on June 11, 1999. (*Id.*) Robertson filed a charge with the EEOC alleging age and disability discrimination on December 1, 2000. (*Id.*, Ex. 4.) The EEOC dismissed the charge and issued a notice of right to sue on April 25, 2001. (*Id.*) In addition, on December 3, 2001, plaintiff Patricia Kennedy ("Kennedy") filed a questionnaire and affidavit with the EEOC on behalf of herself and others alleging age discrimination by Federal Express. (Pl.'s Ex. 6.) She formally filed a charge of discrimination with the EEOC on May 30, 2002, one month after the current action was commenced. (Pl.'s Ex. 7.) Federal Express has no record of charges of discrimination being filed by any of the other named plaintiffs. (Morrison Decl. ¶ 7.)

Plaintiffs allege in the current action that since 1994, when Federal Express adopted certain practices and procedures, and each year thereafter, Federal Express has followed a pattern or practice of employment procedures that discriminate because of age against plaintiffs and other similarly situated

experienced couriers who are over 40 years old. (Compl. ¶¶ 12, 23.)

Federal Express moves to dismiss the complaint under Rules 12(b)(1) and 12(b)(6) on the grounds that plaintiffs failed to file a charge of discrimination with the EEOC prior to bringing the current lawsuit. Plaintiffs oppose the motion, stating that even though 11 plaintiffs in this case did not file charges with the EEOC, the single filing rule allows them to "piggyback" their claims onto the charges filed by either Jack Haneline II ("Haneline") or those filed by the plaintiffs in *Freeman et al. v. Federal Express*, No. 99-2466 (M.D.Fl. Sept. 25, 2000), *aff'd*, 2002 U.S. App. LEXIS 5816, 2002 WL 187185 (11th Cir. 2002) ("*Freeman*"). Neither Haneline nor the *Freeman* plaintiffs are plaintiffs in the current action. These charges are described briefly below.

A. The Haneline Charge

In May 1995, Haneline filed a charge with the EEOC, alleging that he was personally discriminated against under Title VII and the ADEA. (Compl. ¶ 29; Morrison Decl., Ex. 5.) The EEOC dismissed this charge in June 1996, but Haneline never filed suit. (Morrison Decl., Ex. 5.)

B. Charges filed by Plaintiffs in *Freeman et al. v. Federal Express*

Between 1996 and 1998, six Federal Express employees filed charges with the EEOC, alleging that they were personally subject to age discrimination. (Morrison Decl., Ex. 8.) These charges were dismissed. (*Id.*) Subsequently, on October 26, 1999, these employees brought an action in federal court alleging age discrimination. (Pl.'s Ex. 3.) No class was ever certified in the *Freeman* litigation, and the case

was dismissed without prejudice by the district court on September 25, 2000. (Morrison Decl. ¶¶ 11-12, Ex. 9.)

Some of the plaintiffs in this case attempted to join the *Freeman* suit in March 2001 by listing themselves as parties in a proposed amended complaint that the *Freeman* plaintiffs sought to file with the District Court on March 6, 2001. (Morrison Decl. ¶13, Ex. 10.) No order was ever issued granting the *Freeman* plaintiffs leave to amend, or allowing the plaintiffs in this action to join the *Freeman* litigation. (Morrison Decl. ¶ 13.)

STANDARD OF REVIEW

When deciding a motion to dismiss, the court must "assum[e] the truth of all factual allegations contained in the complaint and draw[] all inferences in the plaintiff's favor." *Boyd v. Nationwide Mut. Ins. Co.*, 208 F.3d 406, 409 (2d Cir. 2000); *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir. 1993). Normally the court must limit itself "to a consideration of the facts that appear on the face of the complaint." *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d Cir. 1984). However, in resolving a motion to dismiss under Rule 12(b)(1), a district court may refer to evidence outside the pleadings. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). In addition, if a defendant's motion to dismiss is for failure to state a claim, the court can consider any documents attached to the complaint as exhibits or incorporated into the complaint by reference. *Newman & Schwartz v. Asplundh Tree Expert Co., Inc.*, 102 F.3d 660, 662 (2d Cir. 1996). In such cases, the court may also consider any documents upon which a plaintiff "solely relies" and which are "integral" to its claims. *Int'l Audiotext Network, Inc. v. AT&T*, 62 F.3d 69, 72 (2d Cir. 1995); *see also Cortec*

Indus., Inc. v. Sum Holding L.P., 949 F.2d 42 (2d Cir. 1991).

DISCUSSION

A. Section 626(d) of the ADEA

Section 626(d) of the ADEA provides:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed-
>
> > (1) within 180 days after the alleged unlawful practice occurred; or
> > (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

29 U.S.C. § 626(d).

Because New York "has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such

discriminatory practice," an individual alleging age discrimination occurring in this state has 300 days after the alleged unlawful activity to file a charge with the EEOC. 29 U.S.C. § 633(b).[2] An ADEA action may be commenced in federal court: (i) as early as sixty days after filing a charge of discrimination with the EEOC, or (ii) as late as ninety days after receiving an EEOC right-to-sue notice. *See id.* § 626 (d), (e); *Vollinger v. Merrill Lynch & Co., Inc.*, 198 F. Supp. 2d 433, 439 (S.D.N.Y. 2002).

An exception to the ADEA's time limitations is the single filing rule. "The single filing rule provides that where one plaintiff has filed a timely charge of discrimination with the appropriate administrative agency, other non-filing plaintiffs may join in a later action in federal court if their individual claims arise out of similar discriminatory treatment in the same time frame." *Levy v. United States Gen. Accounting Office*, 1998 U.S. Dist. LEXIS 5567, No. 97 Civ. 4016, 97 Civ. 4488, 1998 WL 193191, at *2 (S.D.N.Y. Apr. 22, 1998), *aff'd*, 175 F.3d 254 (2d Cir. 1999); *see Snell v. Suffolk County*, 782 F.2d 1094, 1100 (2d Cir. 1986). In *Tolliver v. Xerox Corp.*, the Second Circuit held that in addition to allowing non-filing plaintiffs to opt into an existing action, the single filing rule allowed non-filing plaintiffs to file their own individual actions when they had attempted to opt into a class action brought by filing plaintiffs, but the class had later been decertified. 918 F.2d 1052 (2d Cir. 1990). The filing

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[2] The Court notes that the laws of the other states under which plaintiff brings suit also have provisions prohibiting age discrimination. *See* Cal. Gov't Code § 12900 *et seq.* (California); Fla. Stat. Ann. § 112.043 -.044, § 760.01 (Florida); Ill. Comp. Stat. Ann. Ch. 775, act 5/1-101 *et seq.* (Illinois); Mich. Comp. Laws Ann. § 37.2102 *et seq.* (Michigan); N.J. Stat. Ann. §§ 10:3-1, 10:5-1 (New Jersey).

plaintiff's charge, however, must have contained "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim." *Id.* at 1058. "Such a claim alerts the EEOC that more is alleged than an isolated act of discrimination and affords sufficient notice to the employer to explore conciliation with the affected group." *Id.* "The rationale for this rule is to avoid needless repetition in the filing of administrative charges when the initial claim was sufficient to put the employer on notice of the alleged violations and afford the employer an opportunity for conciliation with the aggrieved employees." *Levy*, 1998 U.S. Dist. LEXIS 5567, 1998 WL 193191, at *2.

B. ADEA Claims of McQuillan and Robertson

McQuillan and Robertson did file charges with the EEOC before bringing this suit. However, these filings were untimely. McQuillan filed his charge with the EEOC on September 11, 1998, nearly four years after the implementation of the policies challenged in this lawsuit. (Morrison Decl., Ex. 3.) Robertson filed his EEOC charge on December 1, 2000, over six years after plaintiffs claim the policies were implemented. (*Id.*, Ex. 4.) Since McQuillan and Robertson did not file their EEOC charges within 300 days of the alleged unlawful practice, as is required by the ADEA, their claims are time-barred.

C. Kennedy's ADEA Claim

Kennedy filed an administrative charge on May 30, 2002, one month after the complaint in this case was filed. (Pl.'s Ex. 7.) Therefore, she has failed to meet the requirement of Section 626(d) that "[n]o civil action may be commenced by an individual under this section until 60 days after a charge

alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." 29 U.S.C. § 626(d). Kennedy argues that her filing of a questionnaire and affidavit with the EEOC in December 2001 satisfies the charge requirement. (Pl.'s Ex. 6.) If that were true, Kennedy's claim in this action would be timely since more than 60 days would have passed since she filed her EEOC charge. However, the Court rejects this argument.

Section 626(d) specifically requires that a "charge" be filed with the EEOC prior to commencing a civil action. 29 U.S.C. § 626(d). If Congress had intended that an intake questionnaire or affidavit constituted sufficient notice to the EEOC of alleged discrimination, it could have specifically stated so, but it did not. While it is true that on occasion, courts have found that an intake questionnaire constitutes a formal charge, *see, e.g., Angotti v. Kenyon & Kenyon*, 929 F. Supp. 651 (S.D.N.Y. 1996); *O'Connor v. Pan Am*, 1990 U.S. Dist. LEXIS 5403, No. 88 Civ. 5962, 1990 WL 118286 (S.D.N.Y. May 4, 1990); *Halas v. Ford Motor Co.*, 987 F. Supp. 227 (W.D.N.Y. 1997), these cases involved situations where the plaintiff had been led by the EEOC to believe that the questionnaire alone constituted sufficient notice to the EEOC of the alleged discrimination. Such is not the case here. Therefore, the Court finds that Kennedy's questionnaire and affidavit should not be considered the equivalent of a charge, and that her charge, dated May 30, 2002, was untimely since it was filed one month after the current action was commenced.

D. ADEA Claims of the other 11 Plaintiffs

The other 11 plaintiffs never filed charges with the EEOC. However, they argue that they are covered by the single filing rule, which in limited circumstances, permits a party who has

not filed an administrative charge to participate in a lawsuit by piggybacking on the administrative charge of another party who has properly commenced suit. These plaintiffs attempt to "piggyback" on either the actions brought by Haneline or the plaintiffs in *Freeman*. However, the Court finds that neither charge allows plaintiffs to take advantage of the single filing rule.

1. The Haneline Charge

While Haneline filed a charge, this charge alleged that he was being discriminated against personally. (Morrison Decl., Ex. 5.) It failed to give the EEOC "some indication that the grievance affects a group of individuals defined broadly enough to include those who seek to piggyback on the claim." *Tolliver*, 918 F.2d at 1058. Therefore, the plaintiffs in this action are unable to bring this suit based on Haneline's charge.[3]

2. The *Freeman* charges

Similarly, none of the charges filed by the *Freeman* plaintiffs gave any indication that the grievance affected a group of individuals. (Morrison Decl., Ex. 8.) Therefore, the plaintiffs may not piggyback off of these charges. As discussed above, the Court also rejects plaintiffs' argument that because their questionnaires and affidavits alleged group

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[3] Moreover, while Haneline received a notice of right to sue in June 1996, he never commenced a lawsuit. As the Fifth Circuit has recently noted, "no circuit has ever authorized piggybacking on an EEOC charge when the individual who filed the charge never actually filed suit." *Bettcher v. Brown Schools, Inc.*, 262 F.3d 492, 495 (5th Cir. 2001).

discrimination, the single filing rule is applicable. As the Seventh Circuit has stated:

> [I]t is the charge rather than the questionnaire that matters. Only the charge is sent to the employer, and therefore only the charge can affect the process of conciliation. What is more, the charge is not the work of a faceless bureaucrat, leaving victims of discrimination helpless to protect themselves. Complainants are free to draft and file charges on their own, or hire attorneys to do so, and a charge drafted by the EEOC's staff is not filed unless the complainant signs it ... If she had been dissatisfied with the staff's understanding of her answers, all she had to do was point this out and ask for an addition.

Novitsky v. Am. Consulting Eng'rs, L.L.C., 196 F.3d 699, 702 (7th Cir. 1999).

The Court also notes that *Freeman* is distinguishable from *Tolliver*, in which the single filing rule was held to be applicable. In *Tolliver*, 18 employees who had not filed administrative charges opted into an existing ADEA class action, in which plaintiffs had filed valid administrative charges. 918 F.2d at 1055. The class, however, was later decertified. The Second Circuit allowed the non-filing employees to then bring individual actions by piggybacking on the charges of the filing plaintiffs, despite the class decertification. *Id.* at 1057.

Unlike *Tolliver*, however, the district court never certified a class in *Freeman*. (Morrison Decl. ¶¶ 11-12, Ex. 9.) In addition, the plaintiffs in this action attempted to become part of the Freeman action only after it had been dismissed. (Morrison Decl. ¶ 13, Ex. 10.) The Court declines to extend

the single filing rule to a case containing such procedural differences. *See Bliss v. Rochester City Sch. Dist.*, 196 F. Supp. 2d 314, 323 (W.D.N.Y. 2002) ("[P]laintiff also argues that she was not required to file any charge at all because she considers herself to be a member of a class action in the *Seils* case, and she attempts to 'piggyback' on the charges filed in that case ... [T]his argument fails because no class was ever certified in the *Seils* case").

D. Plaintiffs' State Law Claims

Because plaintiffs' federal claims under the ADEA are dismissed, and plaintiffs are not asserting subject matter jurisdiction under 28 U.S.C. § 1332, the Court declines to retain jurisdiction over plaintiffs' state claims. *See Rocco v. New York State Teamster's Conference Pension and Ret. Fund*, 281 F.3d 62, 72 (2d Cir. 2002).

CONCLUSION

For the foregoing reasons, the Court grants Federal Express's motion to dismiss plaintiffs' ADEA claims, without leave to replead. Because the Court dismisses plaintiffs' federal claims, it declines to exercise jurisdiction over plaintiffs' state law claims. Complaint dismissed.

Dated: October 8, 2002

New York, New York

SO ORDERED.

/s/
Lawrence M. McKenna
U.S.D.J.

APPENDIX F

INTAKE QUESTIONNAIRE

[see fold out exhibit on following page]

INTAKE QUESTIONNAIRE A-157

If form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

EEOC USE ONLY
Name (Intake Officer)

Please answer the following questions, telling us briefly why you have been discriminated against in employment. An officer of the EEOC will talk with you after you complete this form.

DOB: [redacted]59 (Please print) SSN: [redacted]

NAME: PATRICIA ANN KENNEDY Date: 12-3-01
(First) (Middle Name or Initial) (Last)

ADDRESS: 7042 MAIDSTONE CT Phone No. (include area code): 727-376-7042

CITY: NEW PORT RICHEY STATE FL ZIP CODE 34653

Please provide the name of an individual at a different address who is in the local area and who would know how to reach you.

NAME: IRENE LEHR RELATIONSHIP: MOTHER TELEPHONE: 727-372-8039

ADDRESS: 8039 OLD CR 54 CITY NEW PORT RICHEY STATE FL ZIP CODE 34653

Why do you believe this action was taken against you? (e.g., Race, Color, Religion, Sex, Age, Disability, or National Origin.)

AGE DISCRIMINATION

What action was taken against you that you believe to be discrimination? What harm, if any, was caused to you or others in your work situation as a result of that action? (e.g., Discharge, Discipline, or Harassment) (If more space is required, use reverse.)

Over the past several years Management has treated me and Others differently on virtually every facit of my job, including but not limited to staffing time; (OVER)

I believe I was discriminated against by: (Check those that apply)

☒ EMPLOYER ☐ UNION (Give Local No.) ☐ EMPLOYMENT AGENCY ☐ OTHER (Specify)

NAME: FEDERAL EXPRESS CORP.
ADDRESS: 1881 MAIN ST DUNEDIN FL 34698
PHONE: 727-736-6727

NAME:
ADDRESS:
PHONE:

Approximate number employed by this employer: 100

What was the most recent date the harm you alleged took place? 12-3-01 AND CONTINUING

Are you now employed by the employer that you believe discriminated against you? YES

IF YES:
HIRED: 8-17-87 (Date)
CURRENT POSITION: COURIER

IF NO:
APPLIED FOR (Position)
ON (Date)

OR:
WAS EMPLOYED AS (Position)
UNTIL (DATE)
I WAS (Laid off, Fired, etc.)

Finally, your identity will be disclosed to the organization which allegedly discriminated against you. Do you ☒ Consent or ☐ not consent to such disclosure?

Have you sought assistance about the action you think was discriminatory from any Government agency, from your union, an attorney, or from any other source? ☒ NO ☐ YES (If answer is yes, complete below.)

NAME OF SOURCE OF ASSISTANCE: DATE:

RESULTS, IF ANY: N/A

Have you filed an EEOC charge in the past? ☒ NO ☐ YES (If answer is yes, complete below.)

APPROX. DATE FILED:	ORGANIZATION CHARGED:	CHARGE NUMBER (If known):

SIGNATURE Patricia A. Kennedy DATE 12-3-01

Form 283 Patricia A. Kennedy 2-3-02

BEST AVAILABLE COPY

STATE OF FLORIDA CASE NAME _____

CITY/COUNTY OF Dunedin/Pinellas CASE NO. _____

AFFIDAVIT

I, Patricia A. Kennedy, being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 42 years of age, my gender is female and my racial identity is Caucasian.
My date of birth is [REDACTED]/59. My Social Security number is [REDACTED].
I reside at 7042 Maidstone Court.
City of New Port Richey. County of Pasco.
State of Florida. Zip Code 34653.
My telephone number is (including area code) 727-376-7042.

My complaint is against Federal Express Corporation which is located at 1881 Main Street in Dunedin Florida 34698.
Its telephone number is (including area code) 727-736-6727.
My job classification is (if applicable) Courier. My wage is $17.39.
My Immediate supervisor is (if applicable) Chris Savas Operations Manager.

Patricia A. Kennedy's EEOC Affidavit

Since I was hired by FedEx in 1987, I have given 100% to my job which I am proud of. During the first eight years of my career at FedEx, my performance reviews and bonus pay-outs continually reaffirmed my dedication to my customers and my employer. However, over the last several years I feel that FedEx through the "Best Practice Pays" Program has systematically targeted myself and others thereby making it more difficult for me to confirm that work ethic via their contorted measuring stick, *minimum acceptable performance standards or MAPS*. I feel that FedEx management and their "industrial engineers" have and still are discriminating against me because of my age. I believe my employer's actions violate my civil rights.

Application of B.P.P. Absenteeism Policy Violates ADEA and ADA:

Even before I turned 40 I felt I was being treated differently because of my age – ability to heal faster and my pre-1988 hiring date. In October of 1995, Federal Express via BPP instituted a 30 day/90 day Route or Job Retention policy for medical absenteeism which had in place "certain criteria" upon which a panel of non-medical ex-operation management people could determine who loses their route for injuries (around 30 days of more) and who loses their station full time slot for injuries (around 90 days or more). In January, 1996, Best Practice Pays declared the need for a new absenteeism policy which could for the first time negatively impact on-the-job injuries and which could lead to discipline up to and including termination. And this policy obviously impacted older, slower to heal workers *plus*, it was absolutely applied in a discriminatory manner. This in 1997 I *became* displaced from the CLW station due to an on-the-job injury, a younger,

post-1988 employee was promoted to full time and took my route and full time slot. But from this displacement I was lucky to find a full time slot open in East Tampa at the MCF station (a much longer commute) and I also learned their older employees were being subjected to the same hostile work environment games as my fellow co-workers at the Dunedin CLW station. It should be noted that my new MCF co-workers were bolder and filed many more EEOC age discrimination affidavits; their inability to grasp how and why they were being treated differently lead most of them to frustration and fear of reprisal. I know of several older couriers who were fired and/or constructively terminated as a result of these BPP policy and procedure changes. I don't know of a single younger employee who lost their job because of such policies. Such policies and procedures and management's ability to determine *"fault"* for accidents occurring in the work place further heightens my frustrations and fears. I don't want to give in to their desire to have me walk away from this job but I often question the pros and cons of whether or not it would be better to walk away versus being fired by a "good" company to work for.

Application of BPP Employee Reviewing Standards and Methods Violates ADEA:

Every year my employer's Survey Feedback Action or SFA promises so long as I do a good job, I'll always have a job! Notwithstanding what FedEx has done with its treatment of on-the-job injuries (many of which are repetitive motion injuries which you get by doing a good job), my company has through its BPP program completely polluted the methods of calculating and defining what is a "good job" to the point that older employees like myself no longer know if we even will have a job tomorrow. In other words, what was once

considered a good enough performance to get a bonus is now borderline for *job retention*.

And these ever-changing BPP *minimum acceptable performance states (MAPS)* ARE NOT being applied to the younger couriers or there would be many more terminations and/or employees walking away from their jobs amount this group of younger employees. And this is just one area where the hostile work environment works upon us older employees – where operation managers and industrial engineers keep turning up our numbers trying to pressure us to leave or be terminated while the younger couriers are not being held to the same standards. And as a result of such discrimination, younger couriers stand ready to reap the benefits of another full time slot becoming open.

When BPP was originally introduced in November, 1994 you and your manager were supposed to go out on the road and then sit down and arrive at mutually agreeable productivity goals. And for the first few years, management would attempt to make it appear that they were following this course. However, from time to time management would single out older couriers and try to get them to sign off on unrealistic goals via high pressure and deceit. In the mean time, Memphis has discovered many ways to raise your numbers without our approval by changing the way our productivity is calculated (i.e. adding the time in your delivery cycle for going to and from your route so that any time spent driving in excess of the time allotted would further dilute your productivity efficiency). And although these subversions may appear to be applied to all couriers equally (don't know how generous management is being in calculating their driving time), the fear of accountability remains highest among us older couriers. Also, when management check rides an older courier, they make sure that they increase your stops

per hour goal so that you are lucky to be at a 4 for your review. To make matters worse, my manager is now raising my numbers *at will* because he says Memphis believes our goals should be established by each persons' highest daily productivity for any three days during the previous six weeks. Thus, everyone will be always **UNDER** Memphis' *minimum acceptable performance standards* (MAPS 4 rating) except for those three days for every six week period. Which means we are subject to be terminated on any given day even though in all reality I'm working the best I always have and should be obtaining the highest score, a 7 and bonus. Such an atmosphere invites discriminatory discipline and further increases our hostile work environment.

On or about July 9, 1996 my perception of where and how management had pigeonholed myself and other older couriers within their BPP age discrimination plan became very clear. Our start times were pushed up another 10 minutes per day, but management also found another means to try and portray each one of us as malcontents, slough-offs (i.e. by only permitting us to be in a code 53 and forbidding us the use of the "general package handling, code 30" - while still continuing to hold us accountable for leaving the building after a maximum of 9 minutes of fine sort, code 53 – management knew such 9 minutes would expire every day before the sort was even done, therefore, we would be in code 53 at least twice as long as other couriers and on paper it would appear as though we were dragging our feet by not leaving the building promptly). Then about 5 ½ years later, I received a copy of a letter dated January 30, 2001 which is addressed to the older couriers under operations manager Lou Fusco regarding Code 53 and that after our stretch/flex and pre-trip to please go into a Code 53 (See Exhibit "1"). Management's attempt to revive this earlier discriminatory practice which places older couriers in a bad light and has

further financial impacts upon each of us was still another driving force in filing this complaint. The laws against age discrimination are there to prevent employers from purposely placing older employees in a false light in order to pressure them into quitting and/or being terminated under false or misleading circumstances.

Since the Spring of 1995, management has continually picked at me and other older couriers emotionally and financially by changing our "start times". I feel the initial changes in start times were the direct result of Memphis' discriminatory training program contained in "High-Velocity Culture Change, A Handbook For Managers". As a result of such implementations, younger couriers with less seniority than me have been getting earlier start times so that they are able to take out just as many stops as I do and get more hours than I do. It's not fair! Younger couriers are starting earlier, getting their trucks and packages organized and ready to get on the road when I am just getting to my truck – seeing my packages thrown inside and outside the truck, and then getting pressured by management to leave the building earlier. Management knows it is holding me and others to a higher standard. When I have a day off, management schedules these people to earlier start times, they leave the station better organized with only 80% of my normal route and when I return to work, management throws it in my face that my replacement gets back to the station more quickly than I do. That's one more thing that makes me feel like quitting and finding another job – I know that's how they are trying to force me out. It's hard to continue to do a good job in the hostile work environment that management has created.

Before Best Practice Pays/High-Velocity Culture Change, older couriers always had the earliest start times – it was the easiest money we make in any given day, less time pressure

and better chance to organize your packages to ensure a smoother day. The early start time was one of three reasons us older couriers would bid (by seniority) on a new or open route (better chance for overtime; better organized routing for less mistakes; and better productivity for bigger bonuses). And together these three reasons translate into a larger monthly retirement check down the road. In March of 2000 I signed an offer letter for a route that has always started at 0650A.M. The offer letter that I was given and signed had a start time of 0700AM, which 10 minute difference really irked me, however, a couple weeks later after repeatedly asking management what day I was to start this route, I was then told my start time would be 0730AM – which was not the specific time stated in offer letter that I signed. When I asked management why I was not asked or assigned to start earlier, I was then told that such extra AM hours were being assigned only to PMers that signed up for extra hours. I then saw PMers that signed up for extra hours working 12 hour days. Management always has a couple different flimsy excuses for discriminating against me, but such obvious discrimination is very upsetting and is meant to drive us away.

My employer has a number of other ways to harass older couriers with alleged errors and missing scan data (they admit to faulty equipment/software – but still want to hold us accountable). Along those lines, recently management has been harassing me about "late" package deliveries. I feel that FedEx has manufactured RDL (right day lates) to show a bad performance on my review. I know I didn't have them and they know other younger couriers have late deliveries almost daily and nothing is said. Management's purpose is clear; they want us to see the disparaging treatment and become so disgusted we quit.

For years I have threatened to quit, threatened to stand up for my rights, but was too afraid to do anything. In the past several months, I have come to realize that by doing nothing I have allowed them to build a stronger case against me with their phony *minimum acceptable performance standards*, their faulty electronic data capturing systems and the other discriminatory BPP policies and procedures. I know I am not alone and many older couriers share my doubts and fears regarding being terminated or forced to retire via management's twisted facts and numbers. We have done a good job. Federal Express does not want us pre-1988 senior employees to continue our employment lest they will have to pay for our retirement health benefits if we can complete 10 continuous years of service between ages 45 and 55. Please force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created within their application of *Best Practice/High-Velocity Culture Change*.

I have read and had an opportunity to correct this Affidavit and Exhibit "1" that together consist of 5 typed pages and swear that these facts are true to the best of my knowledge and belief.

/s/ Patricia A. Kennedy

Before me, the undersigned authority personally appeared Patricia A. Kennedy, who being duly sworn says under oath that the matters and facts set out in the above document, consisting of 6 pages, true and correct to the best of her belief.

Sworn to before me, this 3rd day of November, 2001 by Patricia A. Kennedy who has produced FLORIDA DRIVERS LICENSE as identification.

My Commission expires: /s/ Audrey Mary Maccia (Notary Public)

[stamped seal Audrey Mary Maccia
My commission CC791548
Expires November, 17, 2002]

APPENDIX G

BOST INTAKE QUESTIONNAIRE

[Fold out exhibit see next page]

INTAKE QUESTIONNAIRE

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

EEOC USE ONLY
Name (Intake Officer)

Please answer the following questions, telling us briefly why you have been discriminated against in employment. An officer of the EEOC will talk with you after you complete this form.

DOB: [redacted]/55 (Please print) SSN: [redacted]

NAME: ANTHONY WAYNE BOST Date: 12/18/01
(First) (Middle Name or Initial) (Last)

ADDRESS: 6727 Gloria Blvd Phone No. (include area code): (813) 855-9346

CITY: TAMPA STATE FLA ZIP CODE 33615

Please provide the name of an individual at a different address who is in the local area and who would know how to reach you.

NAME: JEAN D. BOST RELATIONSHIP: MOTHER TELEPHONE: (813) 237 4469

ADDRESS: 4602 VIRGINIA AVE CITY TAMPA STATE FL ZIP CODE 33617

Why do you believe this action was taken against you? (e.g., Race, Color, Religion, Sex, Age, Disability, or National Origin.)

AGE DISCRIMINATION

What action was taken against you that you believe to be discrimination? What harm, if any, was caused to you or others in your work situation as a result of that action? (e.g., Discharge, Discipline, or Harassment) (If more space is required, use reverse.)

FEDERAL EXPRESS VIA BEST PRACTICES PLAYS TARGETED MYSELF AND OTHERS BY ABUSE OF POLICY SCRUTINIZING OUR PRODUCTIVITY AND STRICT TIMES AND MADE UNREASONABLE PERFORMANCE DEMANDS AND THREATS OF ADDITIONAL COUNSEL DISCIPLINARY ACTION WHERE YOURSELF

I believe I was discriminated against by: (Check those that apply)

☒ EMPLOYER ☐ UNION (Give Local No.) ☐ EMPLOYMENT AGENCY ☐ OTHER (Specify)

NAME: FEDERAL EXPRESS	NAME:
ADDRESS: 1681 MAIN ST	ADDRESS:
PHONE: (727) 736-6727	PHONE:
Approximate number employed by this employer: 100+	What was the most recent date the harm you alleged took place? CONTINUING ABOUT 9/01 AND CONTINUING

Are you now employed by the employer that you believe discriminated against you? YES

YES:	NO:	OR:
FROM: 10/29/84 (Date)	APPLIED FOR _____ (Position)	WAS EMPLOYED AS _____ (Position)
CURRENT POSITION: COURIER	ON _____ (Date)	UNTIL (DATE) _____ I WAS _____ (Laid off, Fired, etc.)

Normally, your identity will be disclosed to the organization which allegedly discriminated against you. Do you ☒ Consent or ☐ not consent to such disclosure?

Have you sought assistance about the action you think was discriminatory from any Government agency, from your union, an attorney, or from any other source? ☐ NO ☒ YES (If answer is yes, complete below.)

NAME OF SOURCE OF ASSISTANCE: DAVID ROSE/ATTORNEY DATE: 12/18/01

RESULTS, IF ANY:

Have you filed an EEOC charge in the past? ☒ NO ☐ YES (If answer is yes, complete below.)

APPROX. DATE FILED:	ORGANIZATION CHARGED:	CHARGE NUMBER (If known):

SIGNATURE Anthony Bost DATE 12/18/01

COWORKERS ARE NOT EVEN AWARE OF SUCH STANDARDS. THEIR CONTINUING ACTIONS HAVE COST ME THOUSANDS OF DOLLARS AND INTENSE EMOTIONAL DISTRESS VIA THEIR HOSTILE WORK ENVIRONMENT.

PRIVACY ACT STATEMENT

(This form is covered by the Privacy Act of 1974; Public Law 93-579. Authority for requesting the personal data and the uses thereof are given below.)

1. *FORM NUMBER/TITLE/DATE. EEOC FORM 283, Intake Questionnaire, August 1987.*

2. *AUTHORITY. 42 U.S.C. § 2000e-5b, 29 U.S.C. § 211, 29 U.S.C. § 626.*

3. *PRINCIPAL PURPOSE. The purpose of this questionnaire is to solicit information to enable the Commission to avoid the intake of matters not within its jurisdiction.*

4. *ROUTINE USES. Information provided on this form will be used by Commission employees to determine the existence of facts relevant to a decision as to whether the Commission has jurisdiction over potential charges, complaints or allegations of employment discrimination and to provide such pre-charge filing counseling as is appropriate. Information provided on this form may be disclosed to other State, local and federal agencies as may be appropriate or necessary to carrying out the Commission's functions. This would include employment practices laws. Information may also be disclosed to charging parties in consideration of or in connection with litigation.*

5. *WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION. The providing of this information is voluntary but the failure to do so may hamper the Commission's investigation of a charge of discrimination. It is not mandatory that this form be used to provide the requested information.*

STATE OF FLORIDA CASE NAME _____

CITY/COUNTY OF Dunedin/Pinellas CASE NO. _____

AFFIDAVIT

I, Anthony W. Bost, being first duly sworn upon my oath affirm and hereby say:

I have been given assurances by an Agent of the U.S. Equal Employment Opportunity Commission that this Affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the Government to produce the affidavit in a formal proceeding. Upon the closing of this case, the Affidavit may be subject to disclosure in accordance with Agency policy.

I am 46 years of age, my gender is male and my racial identity is Caucasian.
My date of birth was [REDACTED]/55. My Social Security Number is [REDACTED].
I reside at 6723 Grand Bahama Drive. City of Tampa. County of Hillsbourgh. State of Florida. Zip Code 33615.
My telephone number is (including area code) 813-855-9340.

My complaint is against Federal Express Corporation which is located at 1881 Main Street, in Dunedin, Florida 34698.
Its telephone number is (including area code) 727-736-6727.
My job classification is (if applicable) Courier. My wage is $17.39. My immediate supervisor is (if applicable) Chris Savas, Operations Manager.

For more than five years I have tried to convince myself that if I don't strongly object to their age discrimination policies maybe Federal Express will lose interest in their pursuit of me and things will return to the way they were. But local management via Memphis' "industrial engineers" have relentlessly and discriminately attacked my work ethic and pocket book via changes in work schedules, job functions and performance reviewing policies designed to project myself and others similarly situated out as poorly performing employees who are not worthy of job retention. The names and faces of management have changed many times, but Federal Express' planned hostile work environment has continued targeting older couriers via disparaging applications of policies and procedures designed to frustrated us older employees to retire early or be pushed into unsafe or unacceptable acts which would result in career ending injuries, insubordination and/or other disciplinary charges leading up to termination.

I Was A *Best Practice Pays "Target"* Then and Now:

In the early days of "Best Practice Pays" November 1994 to July 1996, I could see the company was rapidly changing the way it was dealing with "older employees", but I did not consider myself one of them. But throughout this period I began to realized management did consider me one of them. However, even before I would allow myself to think about "being" more closely scrutinized by management, I could really see the other older couriers being impacted by big and small corporate changes being glorified under the banner of "Best Practices Pays", an alleged extra compensation package for us couriers. Yes, I did start receiving the same performance reminders about missing electronic scans, proof of delivery, late deliveries, etc. just like the older employees. And I also received the same unwarranted productivity

increases and was segregated with older couriers regarding special assignments during late aircraft delays etc. But I still wanted to believe my job was safer if I could turn the other cheek and ignore what was happening to me. Every time I would look at the station work schedule the reality of my situation would dig into my inner soul - younger couriers were getting the earliest start times, the easy money. And every morning when I go down to my truck, I see the younger couriers' trucks all routed out (due to their earlier start time) and then I look at my packages thrown all around - and I do a slow burn. And if I am really unlucky, my senior station manager or operation manager position themselves on top of me and inquire why I am the last one out of the building. Management knows I'm the last one to get to my truck; then they throw the spotlight on me inside the hostile work environment they created. It is all I can do to face the public with a positive attitude after such a beginning. Moreover, by not fighting each time management wanted to bump my minimum acceptable performance stops pe hour goals via checkrides, my semi-annual performance reviews and therefore, bonus incentives were greatly reduced by their discriminatory BPP program. And now I'm stuck with those artificially inflated numbers and such subsequent manipulations (i.e. adding stem time to and from you route into your on-road productivity hours to tweak your goals even higher) further burden me mentally and financially.

But such was the overall objective of Best Practice Pays/High-Velocity Culture Change. My company's discriminatory plan, BPP, was designed to decrease our desire to come to work by creating a hostile work environment while reducing our pay check via later start times, re-distributing the easy parts of our routes to younger couriers via "super looping" and permanent P-2 drop zones and then further attacking our work ethic (productivity) via unjustified

increases in our stops per hour via intimidation and more recently, by including non-delivery stem time and demanding more sales leads in the productivity work cycle, while at the same time forcing us to make more pick ups which are not counted toward our delivery cycle productivity goals, etc.

Changing Older Couriers' Start Times:

Once upon a time, before Best Practice Pays/High-Velocity Culture Change, older couriers always had the earliest start times – it was the easiest money we make in any given day, less time pressure and better chance to organize your packages to ensure a smoother day. The early start time was one of three reasons us older couriers would bid (by seniority) on a new or open route (better chance for overtime; better organized routing for less mistakes; and better productivity for bigger bonuses). An altogether the three reasons translate into a larger monthly retirement check down the road.

My start time, like so many other older couriers began to change when Teri Galloway became our Senior Manager and began to echo the threat that Memphis' "Station Review Process" would effect more radical changes if the station didn't or wouldn't reduce its own in station and on-road hours and if you don't like change, there is the door! Thus, in April, 1995 many of us older couriers began to lose 25 minutes per day (later start time) to younger couriers who merely took our package handling hours, thus no real reduction. And later, on or about July 9, 1996, my perception of where and how management had pigeon-holed myself and other older couriers within their BBP age discrimination plan became *very clear*. At an A.M. meeting on July 9th, Ardy Piazza informed seven older couriers our start times would be moved back 10 minutes later and we

would not be allowed to use a Code 30 (general package handling code) – but must go directly into a fine sort Code 53.

Several couriers at the conclusion of this meeting told Mr. Piazza such "special" treatment by management would over-inflate our Code 53 (only 9 minutes allowed) and make each one of us appear as though we are dragging our feet and that would not be right. Sometime in the next week to ten days, management "discovered" the time-card computer program would not allow an employee to go directly into the fine sort Code 53 – that we must be in a general package handling Code 30 for a minimum of 10 minutes. Management tried to take credit for "relaxing" the new "No Code 30" policy without admitting the computer would not allow this but we already knew the truth via one of our CSA's (it should be noted, current CLW management tried to reinstate this "No Code 30" policy against us older couriers earlier this year – apparently they discovered the same problem after writing their memo).

The actual amount of time us older couriers would lose to younger couriers, swing drivers and p.m. "*overtime special*" employees can vary from time to time depending upon who they chose to place under the spot light. Management may show the EEOC start time schedules where younger couriers and others were also reduced, however, the initial action of removing us from the earliest start times and such "fine tuning" by Memphis' *industrial engineers* who take additional hours out of our weekly checks for months at a time is where the application of their discriminatory conduct festers. And such discriminatory conduct continues to infringe upon our current and future retirement income as well as our ability to retain our job due to the increased pressure to sort our truck to minimize mistakes (missing van scans, missorted packages, and over-looked P-1's) and at the same time, fighting off

management's negative comments and icy glares for not leaving the building more quickly than other younger co-workers who start earlier each day. This is just one of the many ways FedEx can directly tweak their hostile work environment up another notch and hope another older courier just walks away. Another prime example of disparaging treatment and management's intent to put us into a position to fail inside their hostile work environment becomes crystal clear when any of us go on vacation or take a single day off. The younger couriers' start almost ONE hour earlier and they ONLY take out about 80% of our normal work load so each younger courier can have a smooth and more efficient day. And then when we return from vacation, our respective manager then throws it in our face ... "What took you so long – the swing driver has better numbers and always gets back to the station at an earlier time." Confronting management with their discriminatory conduct sometimes produced some temporary relief (i.e. back in October of 2000, I told my manager exactly why the swing driver got back to the station quicker ... earlier start time with less stops in a smaller area ... and suddenly my start times were 30 minutes earlier the following week and when they were again pushed back to the later times, he told me I wasn't doing the job on the belt ... a week later he came back to me and said he was wrong to say that, but my start time didn't revert back to the earlier times). But the bottom line is management wants us older couriers to start later so we can try to go faster and catch up, causing you to make more mistakes while losing all concerns for safety. Economics are not even a consideration or why would management schedule PMer's to unload the AM freight for guaranteed overtime while they know older AM couriers will not get 35 hours and yet pay the guaranteed 35 hour minimum – management has never asked me if I would be willing to unload the AM freight and have an earlier start time. Management wants us to "see" the contrast; they tell us to

"save" ourselves and don't work over 8 hours. Meanwhile, younger couriers are working 12-14 hours to get the job done (Note: due to DOT regulations, no one can work over 12 hours a day so management merely "adjusts" the younger couriers' timecards by shifting the "excess" to another day – thus, my employer is breaking the ADEA by stealing work from older couriers and then not paying the overtime premium to those younger couriers). But economics is not even a motivating factor. Age discrimination is the goal! And I know and their actions prove I am one of their *targets*. I still give my employer 110% effort notwithstanding how I am being treated by them. I am submitting this affidavit in hope that Federal Express will return to the people company it once was and treat myself and other older couriers fairly according to the laws of this country.

I have read and had an opportunity to correct this Affidavit that together consist of ____ typed pages and swear that these facts are true to the best of my knowledge and belief.

/s/_____
Anthony W. Bost

Before me, the undersigned authority personally appeared /s/ Anthony W. Bost, who being duly sworn, says under oath that the matters and facts set out in the above document, consisting of 6 pages, true and correct to the best of his belief.

Sworn to before me, this 18 day of December, 2001 by /s/ Anthony W. Bost who has produced Fla Lic # B230-017-55-423-0 as identification.

My Commission expires:

/s/_____
Audrey Mary Maccia (Notary Public)

My Commission CC791543 Expires November 17, 2002

[stamped seal Audrey Mary Maccia
My commission CC791548
Expires November, 17, 2002]

APPENDIX H

TITLE 29. LABOR
CHAPTER 14. AGE DISCRIMINATION IN EMPLOYMENT

29 U.S.C. § 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act [29 USCS §§ 621 et seq.;] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of

meeting problems arising from the impact of age on employment.

29 U.S.C. § 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations. The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 209 and 211).

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion. The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act [29 USCS § 623] shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided,* That liquidated damages shall be payable only in cases of willful violations of this Act In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to

effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial.

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Secretary; timeliness; conciliation, conference, and persuasion. No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) [29 USCS § 633(b)] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice. Section 10 of the Portal-to-Portal Act of 1947 [29 USCS § 259] shall apply to actions under this Act. If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) [29 USCS § 630(a)] against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver.

(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in

court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 [29 USCS § 623 or 633a] may not be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

29 U.S.C. § 633. Federal-State relationship

(a) Federal action superseding State action. Nothing in this Act shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings. In the case of an alleged unlawful practice occurring in a State which has a law prohibiting

discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act [29 USCS § 626] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER XIV -- EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PART 1626 -- PROCEDURES -- AGE DISCRIMINATION IN EMPLOYMENT ACT

29 C.F.R. § 1626.1 Purpose.

The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of the Age Discrimination in Employment Act of 1967, as amended.

29 C.F.R. § 1626.3 Other definitions.

For purpose of this part, the term the Act shall mean the Age Discrimination in Employment Act of 1967, as amended; the Commission shall mean the Equal Employment Opportunity Commission or any of its designated representatives; charge shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act; complaint shall mean information received from any source, that is not a charge, which alleges that a named prospective defendant has engaged in or is about to engage in actions in violation of the Act; charging party means the person filing a charge; complainant means the person filing a complaint; and respondent means the person named as a prospective defendant in a charge or complaint, or as a result of a Commission-initiated investigation.

29 C.F.R. § 1626.6 Form of charge.

A charge shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s). Charges received in person or by telephone shall be reduced to writing.

29 C.F.R. § 1626.8 Contents of charge; amendment of charge.

(a) In addition to the requirements of § 1626.6, each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge;

(2) The full name and address of the person against whom the charge is made;

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;

(4) If known, the approximate number of employees of the prospective defendant employer or members of the prospective defendant labor organization.

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of § 1626.6.

(c) A charge may be amended to clarify or amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not again be referred to the appropriate State agency.